PP

v.

MOHD AMIN MOHD RAZALI & ORS

HIGH COURT MALAYA, KUALA LUMPUR
ZULKEFLI AHMAD MAKINUDIN J
[CRIMINAL TRIAL NO: 45-34-2000]
18 JANUARY 2002

CRIMINAL LAW: *Penal Code - Section 121 - Waging war against the Yang di-Pertuan Agong - Whether charge defective - Whether accused had knowledge of offence - Whether role of each accused relevant - Whether there was duress - Whether accused labouring under mistake of fact or law*

CRIMINAL PROCEDURE: *Prosecution - Attorney General - Powers of - Discretion to prefer alternative charge against certain accused - Whether abuse of process of court*

CRIMINAL PROCEDURE: *Sentence - Principles of sentencing - Minimum and maximum sentence prescribed under s. 121 of the Penal Code - Duty of court to act accordingly - Whether public interest outweighs interest of accused*

The accused persons were charged under s. 121 of the Penal Code ('the Code') for committing the offence of waging war against the Yang di-Pertuan Agong. They however contended that the charge was defective as: (1) there was no indication by the prosecution which kind of waging of war was intended; (2) the word "jointly" was omitted in the charge; and (3) the alternative charge offered to fourteen of the accused persons and accepted by ten of them amounted to an abuse of the process of court as the Attorney General should have preferred the same alternative charge against the present accused persons. They also averred that: (1) the prosecution failed to show the element of *mens rea* in the commission of the offence; (2) there was no evidence of the role of each accused; (3) that they were under duress to follow directions; and (4) that they were labouring under a mistake when they committed the offence.

Held:

[1] Based on arts. 39 and 40(1) of the Federal Constitution a reference to the words "wages war against the Yang di-Pertuan Agong" appearing in s. 121 of the Penal Code should be interpreted to mean waging war against the Government of Malaysia in the light of the

fact that the executive authority of the Federation is vested in the Yang di-Pertuan Agong who acts on the advice of the Cabinet or of a minister acting under the general authority of the Cabinet. (pp 291 i-292 a)

[1a] The omission to state the word "jointly" as such in the charge by the prosecution would have no effect on the validity of the charge as the offence under s. 121 of the Code does not differentiate between the principal and accessories and their respective roles; everyone is equally culpable. (p 294 b-c)

[1b] Knowledge, like intention, is a question of fact which may be inferred from the surrounding circumstances of the case and looking at the surrounding circumstances of this case, it would be unreasonable and untenable to make a finding that none of the accused persons in this case knew of their intention to stage an insurrection or a struggle to set up an Islamic state. The action of the accused persons in remaining to fight against the members of the security forces showed that they had the *mens rea* to pursue the struggle along with their leader. (pp 326 g-h & 328 c)

[1c] It does not matter how minor the role of an accused person is for an offence under s. 121 of the Code as the law makes no distinction between the person who was the mastermind or a cook. All are responsible for the treasonable act as long as they formed part of the group and knew the object of the general nature which was to wage war against the government in the name of "jihad". (p 358 e-f)

[1d] There was no such element of threat or duress made against the accused persons that could affect them in deciding their actions. (p 360 h)

[1e] The contention that the accused persons were labouring under a mistake of fact under s. 79 of the Penal Code, or under common law, was unreasonable as the surrounding circumstances of the case would render their belief unjustified. (p 361 f)

[2] The attorney general as the public prosecutor is given a wide discretion over the control and direction of all criminal proceedings and can decide to prefer a charge for a less serious offence when there is evidence of a more serious offence. It would not be an abuse of process for the prosecution to proceed with the principal charge under s. 121 of the Code against all nineteen persons presently on trial if the prosecution finds that there was ample evidence to support such a conviction on that principal charge. (pp 297 i & 298 d)

[3] Section 121 of the Penal Code gives the court the discretion to pass only a sentence of death or life imprisonment on an accused person convicted for such an offence and the court must act in accordance with the relevant sentencing principles and guidelines. (p 363 a-b)

[3a] Public interest should outweigh the interest of the accused persons as the offence committed appears to be amongst the most serious under the Code, and all the accused persons had been involved either directly or indirectly in realising the objectives and the mission of the Al-Ma'unah group in overthrowing the government of the day by force or violence in the name of "jihad". (p 365 f-g)

[The 1st, 2nd and 3rd accused sentenced to death; the 4th, 5th, 9th, 10th, 11th, 12th, 15th, 16th, 17th, 19th, 20th, 22nd, 23rd, 24th, 25th and 29th accused sentenced to life imprisonment.]

Case(s) refererd to:

Arulpragasan Sandaraju v. PP [1996] 4 CLJ 597 ***(refd)***
Aung Hla & Ors v. Emperor AIR [1931] Rangoon 235 ***(refd)***
Bachan Singh v. State of Punjab AIR [1980] SC 898 ***(refd)***
Beckford v. The Queen [1988] AC 130 ***(refd)***
Bhandulananda v. PP [1982] 1 MLJ 83 ***(refd)***
Bhojraj v. Sita Ram & Ors [1936] PC 60 ***(refd)***
Chandrasekaran & Ors v. PP [1970] 1 MLJ 153 ***(refd)***
Hui Chi-Ming v. The Queen [1922] 1 AC 34 ***(refd)***
Jubba Mallah v. Emperor 45 Cr LJ 1944 ***(refd)***
Leith McDonald Ratten v. The Queen [1972] AC 378 ***(refd)***
Liew Kaling v. PP [1960] 26 MLJ 306 ***(refd)***
Lim Yow Choon v. PP [1972] 1 MLJ 295 ***(refd)***
Long Samat & Ors v. PP [1974] 2 MLJ 152 ***(refd)***
Maganlal v. King Emperor 47 Cri LJ [1946] ***(refd)***
Mah Kok Cheong v. R [1953] 19 MLJ 46 ***(refd)***
Mat v. PP [1963] 29 MLJ 263 ***(refd)***
Milter v. Minister of Pensions [1947] 2 All ER 373 ***(refd)***
Mir Hasan Khan v. The State AIR [1951] Patna 60 ***(refd)***
Muhammad Salleh v. PP [1969] 1 MLJ 104 ***(refd)***
Muniandy v. PP [1966] 1 MLJ 257 ***(refd)***
PP v. Dato' Seri Anwar Ibrahim [1999] 2 CLJ 215 ***(refd)***
PP v. Datuk Hj Harun Idris [1977] MLJ 15 ***(refd)***
PP v. Hj Ismail [1940] 9 MLJ 76 ***(refd)***
PP v. Jorge Enrique Pellon Tellon [1998] 1 CLJ Supp 118 ***(refd)***
PP v. Loo Choon Fatt [1976] 2 MLJ 256 ***(refd)***
PP v. Mohd Jamil Yahya [1993] 3 MLJ 702 ***(refd)***
PP v. Ong Cheng Heing [1998] 4 CLJ 209 ***(refd)***
PP v. Ravindran [1993] 1 MLJ 45 ***(refd)***

PP v. Saimin & Ors [1971] 2 MLJ 16 ***(refd)***
PP v. Senassi [1970] 2 MLJ 198 ***(refd)***
PP v. Sihabduin Hj Salleh & Anor [1981] CLJ 39; [1981] CLJ (Rep) 82 ***(refd)***
PP v. Sukumaran Sundram [1999] 4 CLJ 242 ***(refd)***
PP v. Teh Ah Cheng [1976] 2 MLJ 186 ***(refd)***
PP v. Yeoh Teck Chye [1981] 2 MLJ 176 ***(refd)***
PP v. Zulkefle Abu Bakar & Anor [2000] 2 CLJ 359 ***(refd)***
R v. Kenneth John Ball [1951] 35 Cr App R 164 ***(refd)***
Sim Min Teck v. PP [1987] 2 CLJ 94; [1987] CLJ (Rep) 1077 ***(refd)***
Subramaniam v. PP [1956] 22 MLJ 220 ***(refd)***
Westminster City Council v. Croyalgrange Ltd & Anor [1986] All ER 352 ***(refd)***
Wong Swee Chin v. PP [1981] 2 MLJ 212 ***(refd)***
Yap See Teck v. PP [1983] 1 CLJ 97; [1983] CLJ (Rep) 953 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 112, 180(1), 182A
Essential (Security Cases) Regulations 1975, reg. 13
Evidence Act 1950, ss. 6, 7, 8(2), 11(b), 30, 32(1)(i), 133
Federal Constitution, arts. 8(1), 39, 40(1), 145(3)
Penal Code, ss. 34, 52, 79, 94, 121A, 122, 124, 130A(b)

Constitution of Singapore, arts. 12(1), 35(8)
Penal Code [India], ss. 121, 124

Other source(s) referred to:
Archbold, 1997, p 2015
Ratanlal & Dhirajlal's, Law of Crimes, 24th edn, pp 323, 471, 472, 473, 476

For the prosecution - Abdul Gani Patail (Yusof Zainal Abiden, Tun Abdul Majid Tun Hamzah, Sallehudin Saidin & Asmah Musa)
For the OKT1 - Karpal Singh (Jugdeep Singh, Ram Karpal Singh & Shopna)
For the OKT2, OKT3, OKT4 & OKT9 - Zabidi Mohamed (PY Leong & Tuan Syed Azimal)
For the OKT5 - Hj Zamani Ibrahim
For the OKT10, OKT11 & OKT24 - Kamarul Hisham (Surina, Suhaimi & Rizal)
For the OKT12, OKT15, OKT16 & OKT17 - Zulkarnain Lukman & Zulkifli Nordin
For the OKT19 & OKT23 - Hasnal Redzua
For the OKT20, OKT22 & OKT29 - Zainal Ithnin (Jallaludin Ismail)
For the OKT25 - Zaini Zainal

Reported by Suresh Nathan

JUDGMENT

Zulkefli Ahmad Makinudin J:

Preliminary

At the commencement of the trial the twenty-nine accused persons were charged under s. 121 of the Penal Code ("the Code") for committing an offence of waging war against the Yang di-Pertuan Agong. In the midst of the prosecution case after the prosecution had completed calling 56 witnesses to give evidence, the Honourable Attorney General for the prosecution offered an alternative charge under s. 122 of the Code to fourteen of the accused persons. Ten of the fourteen accused persons who are identified in this trial as accused persons number six, seven, eight, thirteen, fourteen, eighteen, twenty-one, twenty-six, twenty-seven and twenty-eight accepted the said offer and pleaded guilty to the alternative charge. Having satisfied myself that the said ten accused persons understood the nature and consequence of their plea of guilty to the alternative charge and that all of them have accepted the facts of the case presented by the prosecution without any qualification each of them was sentenced to a term of ten years imprisonment. The prosecution later withdrew the alternative charge offered to the other four accused persons who did not accept the said offer. Thereafter the trial of the remaining nineteen accused persons proceeded forthwith on the principal charge under s. 121 of the Code.

The Charge And The Essential Ingredients To Be Proved

The charge framed against the nineteen accused persons reads as follows:

> Bahawa kamu semua dari bulan Jun 2000 hingga 6 Julai 2000 di beberapa tempat di dalam negeri Perak Darul Ridzuan iaitu:
>
> (a) Pos 2, KM 19, Kuala Rui, Jalanraya Timur Barat, Grik, Hulu Perak;
> (b) 304, Infantri (AW), Kem Grik, Grik, Hulu Perak; dan
> (c) Bukit Jenalik, Kemajuan Tanah Ngor, Sauk, Mukim Cegar Galah, Daerah Kuala Kangsar,
>
> telah melancarkan peperangan terhadap Yang di-Pertuan Agong dan oleh itu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 121 Kanun Keseksaan.

(English Translation of the Charge):

> That all of you from the month of June 2000 until 6 July 2000 at various places in the state of Perak Darul Ridzuan namely,

(a) Post 2, KM 19, Kuala Rhui, Jalanraya Timur Barat, Grik, Hulu Perak.

(b) Battalion 304, Infantri (AW), Kem Grik, Grik, Hulu Perak; and

(c) Bukit Jenalik, Kemajuan Tanah Ngor Sauk, Mukim Cagar Galah, Daerah Kuala Kangsar,

waged war against the Yang di-Pertuan Agong and thereby committed an offence punishable under Section 121 of the Penal Code.

Section 121 of the Code provides as follows:

> Whoever wages war against the Yang di-Pertuan Agong or against any of the Rulers or Yang Dipertua-Yang Dipertua Negeri, or attempts to wage such war, or abets, the waging of such war, shall be punished with death or imprisonment for life, and if not sentenced to death shall also be liable to fine.

It would appear that the evidence required to establish the offence under this s. 121 of the Code would have to be directed to the proving of the following two essential ingredients:

(a) That the accused waged war

(b) That such war was against the Yang di-Pertuan Agong

The First Ingredient – Waging War

On the meaning of the words "wages war" or "waging war" and on the nature of the evidence that needs to be proved under this first ingredient of the offence a reference may be made to a book *Ratanlal & Dhirajlal's Law of Crimes* 24th edn at pp. 471 and 472 wherein the writer quoting the case of *Maganlal v. King Emperor* 47 Cri. LJ 1946 had this to say:

> … The true criterion is the purpose or intention with which the gathering assembled. The object of the gathering must be to attain, by force and violence, an object of a general public nature thereby striking directly against the Government's authority.
>
> …I do not think any great stress can be laid on that distinction. It is true, that in case of levying war the indictments generally charge, that the defendants were armed and arrayed in a warlike manner; and, where the case would admit of it, the other circumstances of swords, guns, drums, colours, etc, have been added. But I think the merits of the case have never turned singly on any of these circumstances.
>
> In the cases of *Damaree and Purchase*, … there was nothing giving in evidence of the usual pageantry of war, no military weapons, no banners or drums, nor any regular consultation previous to the rising; and yet the want of these circumstances weighed nothing with the court, though the prisoners' counsel insisted much on that matter. The number of the insurgents supplied the want of military weapons; and they were provided with axes, crows, and other tools of the like nature, proper for the mischief they intended to effect …

Further at p. 473 the writer stated as follows:

> Insurrections in order to throw down all inclosures, to alter the established law or change religion, to enhance the price of all labour or to open all prisons, all risings in order to effect these innovations of a public and a general concern by an armed force are, in construction of law, high treason, within the clause of levying war: for though they are not levelled at the person, of the king, they are against His Royal Majesty; and besides; they have direct tendency to dissolve all the bonds of society, and to destroy all property and all government too, by numbers and an armed force.

In the book *Archbold* (1997) at p. 2015 on the evidence to maintain the charge of a levying of war under the English Statute of Treason it had this to say:

> In order to constitute a levying of war, the number of persons assembled is not material; three of four will constitute it as fully as a thousand … nor is it necessary that they should be armed with military weapons, with colours flying, etc, although it is usually so stated in the indictment … nor is actual fighting necessary to constitute a levying of war … enlisting and marching are sufficient, without coming to battle … But there must be force accompanying the insurrection, and it must be for an object of a general nature".

In the case of *Aung Hla and Others v. Emperor* AIR [1931] Rangoon 235 the learned judge Page CJ on the meaning of the words "Waging War" at p. 235 stated as follows:

> The words 'waging war' in s. 121 are synonymous with levying war in Statue 25 Edward 3, C.2, and where a multitude rises and assembles to attain by force and violence any object of general public nature it amounts to waging war against the Majesty of the King. It is not the number or the forces but purpose and the intention which congregates and assembles them together and gives the impulse in arming and rising that constitutes the crime and distinguishes it from riot or any other rising for any private purpose. There is further no distinction between principal and accessory and all who take part in the treasonable act incur the same guilt and are liable to the same punishment.
>
> A deliberate and organised attack upon the Crown forces amounts to waging war if the object of the insurgents be to overcome the servants of the Crown by armed force and violence and thereby prevent the general collection of taxes.

The learned judge Page CJ had also referred to the case of *Sir John Friend*'s wherein Holt LCJ had this to say at p. 236:

> If persons do assemble themselves and act with force in opposition to some law which they think inconvenient, and hope thereby to get it repealed this is a levying war and treason" … The question always is, whether the intent is, by force and violence, to attain an object of a general and public nature by any instruments or by dint of their numbers. *Whoever incites, advises,*

encourages or is any way aiding to such a multitude so assembled with such intent, though he does not personally appear among them, or with his own hands commit any violence whatsoever, yet he is equally a principal with those who act, and guilty of high treason. (emphasis added).

The same court also referred to the case of *R v. Purchase* wherein Parker CJ at p. 237 had this to say:

In rebellions it is frequent that few are let into the real design, but yet all that join in it are guilty of the rebellion. It is not for a man to fight for persons actually in rebellion, and say he meant indeed to break the peace, but did not design high treason, he *should have thought of that before he joined those he saw engaged in an unlawful act, if he will knowingly break and contempt the laws, he must be content to suffer the same punishment with those he had joined in breaking them.* (emphasis added).

In the case of *Jubba Mallah v. Emperor* 45 Cr. LJ [1944], the learned judge Shearer J at p. 606 *inter alia* had this to say on what amounts to waging war:

In certain circumstances attacks by riotous mobs on private property might amount to levying war against the King. The mere fact that the mob contented itself with taking possession of one police station and did not manifest any intention of going on to take possession of any other police station does not make the offence necessarily the offence of rioting only, it may amount to be the more serious offence of waging war against the King. An attack made on one police station, can amount to waging war against the King. The persons, who make such an attack are *prima facie* guilty of rioting, and if the Crown charges them instead with waging war against the King, it is incumbent on the Crown to show that there was an insurrection and not a riot, and that the insurrection was for the accomplishment of an object of a general nature. The numbers concerned and the manner in which they were equipped and armed are not material.

Based on the decision of the case authorities herein before cited I am of the view that the nature of the evidence that needs to be proved for the offence of waging war includes the following for consideration:

1. The purpose or intention with which the gathering of group of persons assembled is to stage an insurrection or to challenge directly against the Government's authority.

2. The insurrection or the challenge to Government's authority is by force and violence.

3. The purpose of such an insurrection or challenge to Government's authority is to accomplish an object of a general public nature.

In determining further whether an accused person has committed the offence under s. 121 of the Code the following factors are also to be kept in view:

(1) No specific number of persons is necessary to constitute an offence under the said s. 121.

(2) No actual fighting is necessary to constitute the said offence. Enlisting, marching and making preparation without coming to a battle are sufficient.

(3) The manner in which they are equipped or armed is not material.

(4) There is no distinction between principal and accessory and all who take part in the unlawful act incur the same guilt.

(5) The offence under s. 121 of the Penal Code is a continuing offence and any person can be guilty of the offence at any point of time of his involvement provided such person is aware of the objects or purpose of which the gathering had assembled is to stage an insurrection or to challenge the Government's authority.

I am also of the view that the phrase "wages war" under s. 121 of our Penal Code can be acknowleged to be a substitute for the phrase "levying war" appearing in the English Statute of Treasons, and is used in the same sense. This view is supported by the fact that the offence of waging war under s. 121 of our Penal Code is worded almost in similar terms with the offence of waging war against the Government of India under s. 121 of the Indian Penal Code and s. 121 of the Indian Penal Code is known to have been modelled based on the said English Statute of Treasons. Section 121 of the Indian Penal Code states as follows:

> whoever wages war against the Government of India or attempts to wage such war or abets the waging of such war, shall be punished with death or imprisonment for life and shall also be liable to fine.

The underlying principle governing the enactment of s. 121 of our Penal Code in my view is that as a Sovereign Nation our country must have safeguards for its own preservation and protection. The fundamental characteristics of this offence of waging war which can be equated with the offence of high treason is the betrayal of that faith and allegiance which are due from a subject to his sovereign as the Supreme Head of a State. In the context of a system of Government it can be said that no Government can afford to allow a threat to develop to its existence by any group of people up in arms against the established Government. Although it is the fundamental right of every subject to have his own political theories and ideas and to propagate them and work for their establishment, it must be seen that he does not seek to do so by force and violence or contravening any provision of the law. Section 121 of

our Penal Code is enacted therefore to ensure that a subject of a state acts within the permissible norms of political behaviour, violation of which must be punishable.

The expression "waging war" means and can only mean war in the manner usual in war. In other words, in order to support a conviction on such a charge, it is not enough to show that the persons charged have contrived to obtain possession of an armoury and have, when called upon to surrender it, used the rifles and ammunitions so obtained against the Government troops. It must also be shown that the seizure of the armoury was part and parcel of a planned operation and their intention in resisting the troops of the Government was to overwhelm and defeat these troops and then go and crush any further opposition with which they might meet until either the leaders of the movement succeeded in obtaining possession of the machinery of Government or until those in possession of it yielded to the demand of their leaders (See the case of *Mir Hasan Khan v. The State* AIR [1951] Patna 60).

The Second Ingredient – The Waging Of War Is Against The Yang Di-Pertuan Agong

On the true meaning of waging war against the Yang di-Pertuan Agong a reference may be made again to the book *Ratanlal & Dhirajlal's Law of Crimes* wherein the writer had quoted the case of Lord George Gordon whereby Lord Mansfield in that said case as reported at p. 472 of the book had this to say:

> There are two kinds of levying war: One against the person of the King; to imprison to dethrone, or to kill him, or to make him change measures or remove Counsellors: the other which is said to be levied against the Majesty of the King or in other words against him in his regal capacity, as when a multitude rise and assemble to attain by force and violence any object of a general public nature that is levying war against the Majesty of the King; and most reasonably so held because it tends to dissolve all the bonds of society, to destroy property, and to overturn government and by force of arms, to restrain the King from reigning according to law.

However, Mr. Karpal Singh, the learned counsel for the first accused had submitted that since there are two kinds of levying or waging war against the Yang di-Pertuan Agong the charge framed against the accused persons in the present case is defective as there is no indication by the prosecution which kind of waging of war is intended. Is it against the person of the King or against the Majesty of the King which would mean in effect waging war against the Government. On this point I am of the view that the waging of war as in the charge framed is against the Yang di-Pertuan Agong in his capacity as the head of the Government. In s. 121 of the Indian Penal Code which has a similar provision to s. 121 of our Penal Code the waging of the

war refers to the war against the Government of India. In my view for all intent and purposes the term waging war against the Yang di-Pertuan Agong in the context of s. 121 of our Penal Code can only refer to the waging of war against the Government of Malaysia. Unlike Malaysia which has a Constitutional Monarch, India is a Republic with the President as the head of State. However for both in India and Malaysia it is found that the principles as expounded in the English authorities on levying of war which consists of one against the person of the King and the other which is said to be levied against the King in his regal capacity are already embodied in the respective Penal Codes. In India the provision of s. 124 of the Penal Code refers to the offence against the President of India which is equivalent to the offence against the person of the King in the English authorities. In Malaysia there is a provision in s. 121A of our Penal Code in which this is the specific offence relating to the offence against the person of the Yang di-Pertuan Agong or the Rulers of the States. Section 121A of our Penal Code states as follows:

> Whoever compasses, imagines, invents, devices, or intends the death of or hurt to or imprisonment or restraint of the Yang di-Pertuan Agong or any of the Rulers or the Yang di-Pertua Negeri, their heirs or successors, shall be punished with death and shall also be liable to fine.

Hence from the above provision there is a safeguard that is clearly embodied in our Penal Code for the offence against the Yang di-Pertuan Agong, the Rulers, and the Yang di-Pertua Negeri in their capacity as the person of the King or Ruler or Head of States. In the circumstances of the case the stand taken by the prosecution in charging all the accused persons under s. 121 of the Penal Code is certainly correct in that it is an offence of waging war in the sense that it is against the Government of Malaysia. In this respect it is also necessary to refer to the provision of Articles 39 of our Federal Constitution which states as follows:

> The executive authority of the Federation shall be vested in the Yang di-Pertuan Agong and exercisable subject to the provisions of any Federal law and of the Second Schedule, by him or by the Cabinet or any Minister authorised by the Cabinet, but Parliament may by law confer executive functions on other persons.

Article 40(1) of the Federal Constitution further states *inter alia* as follows:

> In the exercise of his functions under this Constitution or Federal law the Yang di-Pertuan Agong shall act in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet … .

Based on the said arts. 39 and 40(1) of the Federal Constitution a reference to the words "wages war against the Yang di-Pertuan Agong" appearing in s. 121 of the Penal Code should be interpreted to mean as wages war against

the Government of Malaysia in the light of the fact that the executive authority of the Federation is vested in the Yang di-Pertuan Agong and the Yang di-Pertuan Agong acts on the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet.

The Burden Of Proof At The Close Of The Prosecution Case

Notwithstanding the fact that all the nineteen accused persons had been tried in accordance with the Essential (Security Cases) Regulations 1975 and that reg. 13 of the said regulation states that when the case for the prosecution is closed, the court shall call on the accused to enter on his defence, this court is still bound by the majority decision of the Federal Court in the case of *Public Prosecutor v. Sihabduin bin Haji Salleh & Anor* [1981] CLJ 39; [1981] CLJ (Rep) 82 wherein it was held that in a security case at the end of the prosecution case the court is not obliged to call on the accused to enter on his defence unless the prosecution has then proved a *prima facie* case against him.

The offence as in the charge framed against all the nineteen accused persons was alleged to have been committed between the months of June and July 2000. Hence the burden of proof placed upon the prosecution at the close of the case for the prosecution is whether a *prima facie* case had been made out against the accused persons as provided under s. 180(1) of the Criminal Procedure Code ("CPC") and as amended by the Criminal Procedure Code (Amendment) Act 1997 (Act A979). The phrase "*prima facie* case" has not been given a statutory definition under the law. However, after the amendments to the CPC and following from the case of *Arulpragasan Sandaraju v. PP* [1996] 4 CLJ 597 the phrase *prima facie* case has received judicial determination.

His Lordship Augustine Paul J in the case of *PP v. Dato' Seri Anwar bin Ibrahim* [1999] 2 CLJ 215 on the meaning of *prima facie* case at p. 275 had this to say:

> The meaning of *prima facie* case in s. 180(1) of the Criminal Procedure Code must be understood in the context of a non jury trial. A *prima facie* case arises when the evidence in favour of a party is sufficiently strong for the opposing party to be called on to answer. The evidence adduced must be such that it can be overthrown only by rebutting evidence by the other side. Taken in its totality, the force of the evidence must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts existed or did happen. As this exercise cannot be postponed to the end of the trial a maximum evaluation of the credibility of the witnesses must be done at the close of the case for the prosecution before the court can rule that a *prima facie* case has been made out in order to call for defence. Be that as it may, I am unable to agree with the defence submission that this means that the prosecution must prove its case

beyond reasonable doubt at that stage. A case is said to have been proved beyond reasonable only upon a consideration and assessment of all the evidence (see *Canadian Criminal Evidence* (3rd Edition) … thus, a *prima facie* case as prescribed by the new s. 180(1) of the Criminal Procedure Code must mean a case which if unrebutted would warrant a conviction.

In *Public Prosecutor v. Zulkefle Abu Bakar & Anor* [2000] 2 CLJ 359 it was held *inter alia* by his Lordship Abdul Wahab Patail J that the standard of proof to decide whether a *prima facie* case has been made out is proof beyond reasonable doubt and the prosecution must prove, at the end of its case, all of the ingredients of the charge.

In *Public Prosecutor v. Ong Cheng Heing* [1998] 4 CLJ 209 his Lordship Vincent Ng J *inter alia* held that in the light of the amendments in Act A979, a *prima facie* case is a case which is sufficient to call for an answer,whilst *prima facie* evidence is evidence which is sufficient to establish a fact in the absence of any evidence to the contrary but is not conclusive. It follows that there should be credible evidence on each and every essential ingredient of the offence.

In *Public Prosecutor v. Sukumaran Sundram* [1999] 4 CLJ 242 his Lordship Jeffrey Tan J *inter alia* held that the standard of proof of a *prima facie* case is *prima facie* evidence and not conclusive or beyond reasonable doubt evidence. Hence a *prima facie* case is made out where there is sufficient credible *prima facie* evidence establishing each essential ingredient of the offence for a supposition of guilt if it is not answered by the accused and that is all that is needed for the defence to be called.

I would take the view that the phrase "*prima facie* case" used in the context of whether a *prima facie* case had been made out at the close of the prosecution case in order to call for the defence of an accused person would simply mean that at that stage of the case there is credible evidence wherein such evidence adduced is free from reasonable doubt, uncontradicted and proving each and every essential ingredient of the offence which if unrebutted would warrant a conviction of an accused person.

Issues Raised By The Defence During The Submission Of No Case To Answer At The Close Of The Case For Prosecution

Before dealing with the evidence adduced as to whether the prosecution had made out a *prima facie* case against the accused persons I shall first deal with some of the relevant issues raised by learned counsels of the accused persons during their submission of no case to answer at the close of the prosecution case.

It was submitted for the accused persons that the charge framed against them is defective because the word "jointly" is omitted in the charge. It was also contended that there is no indication by the prosecution from the charge framed that as the accused persons they had been charged with common intention under s. 34 of the Penal Code to commit the said offence. I am of the view that on this point the omission to state the said word "jointly" and the failure to spell out common intention as such in the charge by the prosecution would have no effect at all on the validity of the charge. It would appear that the law as spelt out in the offence under s. 121 of the Penal Code does not differentiate between the principal and accessories and their respective roles. Everyone of them is equally culpable. From the nature of the evidence adduced by the prosecution in this case what needs to be proved is the *actus reus* on one or several of the accused persons and the knowledge as to their intention to overthrow the government and to set up their objective of an Islamic State contrary to the Constitution of the country. Therefore if it can be shown that some of them were present at certain places and some at other places and with the knowledge that of their actual purpose to dethrone the government, it is sufficient to make each and every one of them equally liable. (See the case of *Aung Hla and Others v. Emperor (supra)*).

It was also contended on behalf of all the accused persons that the charge framed is defective on the ground that the charge refers to three specific places in the State of Perak but the prosecution had also adduced evidence which includes the firearms shooting incidents carried out by some members of the group called the Persatuan Persaudaraan Ilmu Dalam Al-Ma'unah ("The Al-Ma'unah") to which all the accused persons belonged at Carlsberg brewery factory in Shah Alam, at the Guiness Anchor brewery factory in Petaling Jaya and at the Batu Caves temple in Selangor. On this point I am of the view that the evidence of firearms shooting at the said three places are relevant under ss. 8(2) and 11(b) of the Evidence Act 1950 (Act 56). Section 8(2) of the Evidence Act states as follows:

> The conduct of any party, or of any agent to any party, to any suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding is relevant if the conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

Section 11(b) of the Evidence Act 1950 (Act 56) states as follows:

> Facts not otherwise relevant are relevant if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.

The evidence as regards the firearms shooting at the said above three places was to show and to confirm the intention of the Al-Ma'unah group in carrying out their activities as communicated by them through exhs. P151 and P152 and also the book exh. P166 that was given by the first accused to the prosecution witness PW59. Exhibits P151 and P152 are the transcripts of the contents of a radio message received by the army personnels at Camp 304 Grik on 3rd and 4 July 2000 and are alleged by the prosecution to have been made by the first accused within one-two days after the military weapons were seized and taken away by members of the Al-Ma'unah group from the said Camp 304 Grik. Exhibit P166 is a book which contained the reading materials on "jihad" which is the struggle to overthrow the government. These evidence are relevant to the fact in issue and therefore admissible. I shall be dealing with these issues later when this court examines in details the evidence adduced by the prosecution to prove the essential ingredients of the charge against the accused persons.

Mr Karpal Singh, the learned counsel for the first accused further contended that the alternative charge offered to the fourteen of the accused persons and accepted by ten of them amount to denying the equal protection of the law as provided by art. 8(1) of the Federal Constitution which states as follows:

> All persons are equal before the law and entitled to the equal protection of the law.

It was also submitted by learned counsel that equal protection of the law means subjection to equal laws applying to all in the same circumstances. The learned counsel for the first accused conceded that by virtue of art. 145(3) of the Constitution the Attorney General shall have power exercisable at his discretion to institute, conduct or discontinue any proceedings for an offence. However it was submitted that once the case comes to court, the court is clothed with jurisdiction to deal with the position depending on the evidence led and if there be contravention of art. 8(1) of the Constitution, the court has the duty to give force and expression to the terms of the article. The case of *Public Prosecutor v. Jorge Enrique Pellon Tellon* [1998] 1 CLJ Supp 118 was cited as an authority for the said proposition whereby his Lordship Faiza Tamby Chik J at p. 121 had this to say:

> The deputy public prosecutor cited the Article 145(3) of the Federal Constitution in support of his contention. Let me state categorically here that I am in full agreement with the learned deputy public prosecutor on the power of the Honourable Attorney General as the Public Prosecutor as contained in the Article aforesaid of the Federal Constitution. Nonetheless, let me straight away inform him and announce to all and sundry that the Court would not dream of usurping the powers of the Public Prosecutor. The Public Prosecutor shall have powers exercisable at his discretion, to institute, conduct or

discontinue any proceeding for an offence based on evidence that he has had upon investigation but once the case comes to Court the power of the Public Prosecutor ceases there and immediately the Court is seized with jurisdiction to try the case in accordance with the time honoured rules of procedure and rules of evidence.

In the course of the trial an alternative charge was preferred against ten of the co-accused persons and they pleaded guilty thereto and were each sentenced to ten years imprisonment from the date of the arrest. The alternative charge reads as follows:

> Bahawa kamu semua dari bulan April hingga Julai 2000 di beberapa tempat dalam Negeri Perak Darul Ridzuan iaitu:
>
> (a) Pos 2, KM 19, Kuala Rhui, Jalanraya Timur Barat, Grik, Ulu Perak;
>
> (b) Batalion 314, Infantri (AW) Kem Grik, Grik, Hulu Perak; dan
>
> (c) Bukit Jenalik, Kemajuan Tanah Ngor, Sauk, Mukim Cegar Galah, Daerah Kuala Kangsar,
>
> telah membuat persediaan dengan niat untuk melancarkan peperangan terhadap Yang di-Pertuan Agong dan oleh itu kamu telah melakukan satu kesalahan di bawah seksyen 122, Kanun Keseksaan dan boleh dihukum di bawah seksyen yang sama.

(English Translation of the Alternative Charge).

> That all of you from the month of April until July 2000 at various places in the state of Perak Darul Ridzuan namely:
>
> (a) Post 2, KM 19, Kuala Rhui, Jalanraya Timur Barat, Grik, Hulu Perak;
>
> (b) Batallion 304, Infantri (AW) Kem Grik, Grik, Hulu Perak; and
>
> (c) Bukit Jenalik, Kemajuan Tanah Ngor, Sauk, Mukim Cagar Galah, Daerah Kuala Kangsar,
>
> had made preparation with the intention of waging war against the Yang di-Pertuan Agong and thereby committed an offence punishable under section 122 of the Penal Code and punishable under the same section.

Mr. Karpal Singh submitted that the co-accused persons who pleaded guilty to the alternative charge admitted to elaborate facts presented by the prosecution which have all the ingredients to prove an offence under s. 121 of the Penal Code (the charge faced by the present nineteen accused persons undergoing trial). However the prosecution chose to prefer an alternative charge against them under s. 122 of the Penal Code, namely, preparing to wage war against the Yang di-Pertuan Agong. Mr. Karpal Singh, the learned counsel for

the first accused submitted that the issue which has to be addressed boils down to, "are those presently undergoing trial being denied equal protection as guaranteed to them under art. 8(1) of the Federal Constitution?"

Mr. Karpal Singh also submitted that unfortunately there is no reported authority on this point in Malaysia in relation to the position in our case. The Singapore's case of *Sim Min Teck v. Public Prosecutor* [1987] 2 CLJ 94; [1987] CLJ (Rep) 1077 was however referred to for the purpose of comparing it with the present case before this court. In *Sim Min Tecks*'s case the appellant was convicted on two charges, namely, that the appellant with two other persons (Beh and Ch'ng) in furtherance of common intention committed murder by causing the death of two persons. The appellant was sentenced to death. It was argued on appeal that as Beh had been charged on the same facts with a lesser offence of culpable homicide not amounting to murder, the appellant had been discriminated against contrary to art. 12(1) (equivalent to our art. 8(1)) of the Constitution of Singapore. The Singapore Court of Appeal rejected that contention saying, "The Attorney General of Singapore is by art. 35(8) (equivalent to our art. 145(3)) given power exercisable at his discretion to institute, conduct or discontinue any proceedings for any offence". However, Mr. Karpal Singh the learned counsel for the first accused submitted that *Sim Min Teck* was wrongly decided by the Singapore Court of Appeal. Further it was submitted that in any event, Beh in that case had not been jointly tried with Sim the appellant. Beh had pleaded guilty separately on a charge based on the same facts and not in the midst of a joint trial as in our case. Mr. Karpal Singh therefore contended that *Sim Min Teck*'s case can be distinguished on the facts from the present case.

It was submitted by Mr. Karpal Singh that the presentation of the alternative charge backed by the elaborate facts of the case which equally apply to the accused persons presently undergoing trial for an offence under s. 121 amounts to abuse of process of court as rightly the Attorney General as the Public Prosecutor, should have preferred the same alternative charge against them. Under the circumstances, it was submitted that the court should also frame a charge under s. 122 of the Penal Code against the first accused and the others still undergoing trial to bring the position into accord with the spirit of art. 8(1) of the Federal Constitution.

On the above contention made on behalf of all the accused persons on trial that the alternative charge offered to fourteen of the co-accused and accepted by ten of them amount to denying the accused persons on trial the principles of equal protection of the law, I am of the view that the Attorney General as the Public Prosecutor is given a wide discretion over the control and direction of all criminal proceedings. The Public Prosecutor can in particular decide to prefer a charge for less serious offence when there is evidence of a more

serious offence. The act of the Public Prosecutor in exercising his discretion provided by the law cannot be said to infringe art. 8 of the Federal Constitution. It has to be borne in mind that in the present case the Honourable Attorney General as the Public Prosecutor had informed the court that the alternative charge preferred and offered to the fourteen accused persons was made upon representation made to him by some of the accused persons on trial under the principal charge. As the Public Prosecutor he had duly considered the said representation and decided to offer the alternative charge only to fourteen of the co-accused persons on trial under the principal charge. I am of the view that on this action taken by the Honourable Attorney General I find no aspect of the case which can credibly be described as an abuse of process, that is, something so unfair and wrong that the court should not allow a prosecutor to proceed with what is in all respects a regular proceeding. I am of the view that provided the case was conducted with propriety, it is difficult to see how as a presiding judge in this case I could properly have intervened. It would not be an abuse of process for the prosecution to proceed with the principal charge under s. 121 of the Penal Code against all nineteen accused persons presently on trial if the prosecution finds there are ample evidence to support such a conviction on that principal charge. On this point I would like to refer to the case of *Hui Chi-Ming v. The Queen* [1922] 1 AC 34 wherein the Privy Council *inter alia* held that the prosecution of the defendant in that case for murder rather than manslaughter was not so unfair and wrong so as to constitute an abuse of process which should have led the Judge to refuse to allow the trial to proceed, and that although the defendant's conviction for murder when the principal offender had been convicted of manslaughter only and the prosecution had accepted pleas of guilty to manslaughter from three other participants was a serious anomaly, there was ample evidence to support the defendant's conviction and no ground for interfering with it.

It is an accepted view that the Attorney General as the Public Prosecutor is permitted to take into account the public interest when deciding what charge or charges against an accused person. The Attorney General is in touch with the police and other investigating agencies and therefore he has information not available for the courts and on which to base his decision on whether or not to prosecute and if so on which charge. Therefore, in the present case it can be said the Attorney General must have considered the representations made by the respective accused persons concerned in the light of the investigations papers made available to him and deciding them on the merits of each individual case. It must not be thought that he may have acted unfairly when he did not offer the alternative charge to the other accused persons on trial when at the same trial he offered the alternative charge to fourteen of the twenty-nine accused persons. The public of whose interest the Attorney

General is the guardian has a right to expect him to act honestly, without fear or favour. If he did not do his duty honestly and properly the public would be able to show their disapproval not however in the courts but elsewhere. On this point I would like to refer to the case of *Long bin Samat & Ors. v. Public Prosecutor* [1974] 2 MLJ 152 wherein his Lordship Suffian LP in delivering the judgment of the Federal Court at p. 158 had this to say:

> In our view this clause from the Supreme law clearly gives the Attorney General very wide discretion over the control and direction of all criminal prosecutions. Not only may he institute and conduct any proceedings for an offence, he may also discontinue criminal proceedings that he has instituted, and the Courts cannot compel him to institute any criminal proceedings which he does not wish to institute or to go on with any criminal proceedings which he has decided to discontinue. Still less then would the Court have power to compel him to enhance a charge of a less serious offence. Anyone who is dissatisfied with the Attorney General decision not to prosecute, or not to go on with the prosecution or his discretion to prefer a charge for a less serious offence when there is evidence of a more serious offence which should be tried in a higher Court should seek his remedy elsewhere, but not in the Courts.

Findings Of The Court At The Close Of The Prosecution Case

At the close of the case for the prosecution it is my finding the prosecution has made out a *prima facie* case against all the nineteen accused persons. I find the prosecution has proven that all the accused persons as members of the Al-Ma'unah group had participated in carrying out the purpose or intention of the said group. The purpose or intention with which the members of the Al-Ma'unah group had assembled is to stage an insurrection or to challenge directly against the Government's authority by force or violence. The basis of the struggle of all the accused persons is guided by the so-called "jihad" which is to strive to set up an Islamic State based on the holy Quran. The insurrection was led by the leader of the Al-Ma'unah group named Mohd. Amin Bin Mohd. Razali, the first accused (OKT1) with the collaboration of the other co-accused persons. The said group had carried out their activities under the guise of being registered as a body known as Persatuan Persaudaraan Ilmu Dalam Al-Ma'unah. It is my finding that with regard to the element of waging war the prosecution has successfully adduced evidence to show in fact the presence of the two stages of the act of waging war. The first stage is the preparation made by the Al-Ma'unah group before the waging of the said war or insurrection against the Government's authority. The second stage involved the act of the Al-Ma'unah group in actually waging the war against the Government's authority.

Evidence Relating To The Preparation Before The Waging Of The War

The prosecution has led evidence by calling the relevant witnesses to prove that a well planned preparation was executed by the Al-Ma'unah group to carry out their mission as follows:

(i) The Purchase Of Army Uniforms

According to the prosecution witness PW1 L/Cpl. Hidzir army uniforms were purchased by the members of the Al-Ma'unah before carrying out their mission. PW1 a former member of the Al-Ma'unah gave evidence that OKT1 gave him money for the purpose of purchasing the said army uniforms. PW1 had stated that he had bought 28 pairs of army uniforms from PW2 Cheng Hock Lee and PW3 Cheng Siew Chuan on various dates sometime between May and early June 2000. PW2 and PW3 are self-employed tailors who used to receive orders to make army uniforms from the military personnel at Camp Desa Pahlawan, Kota Bharu. PW1 was directed by OKT1 to send the said purchased army uniforms to a place near Keroh in Perak. PW1 confirmed in his evidence that he knew OKT1 as the leader of the Al-Ma'unah group and he identified OKT1 in court.

It is to be noted that the dates of the purchase of the said army uniforms were so close to the date of the seizure of the military weapon made by the members of the Al-Ma'unah at Post 2, Kuala Rhui and Camp 304, Grik which took place in the early morning on 2 July 2000. The evidence of these three prosecution witnesses appears to be consistent and there is no reason to doubt their credibility. They are also not interested witnesses to the case. Their evidence are relevant under the provisions of ss. 7 and 8 of the Evidence Act to show the circumstances and preparation before the commission of an offence.

(ii) The Acquisition Of Three Pajero Vehicles

The evidence showed that three Pajero vehicles were used by the members of the Al-Ma'unah group led by OKT1 when they seized the military weapons from the two army Camps at Post 2, Kuala Rhui and Camp 304 Grik. As regards the three Pajero vehicles that were used at the said two army camps PW4 Teh Chin Hin and PW5 Gip Soon Kin Ming gave evidence that they had reported the loss of their respective Pajero vehicles as shown in their police reports exhs. P3 and P5. Meanwhile PW9 Yip Weng Kee gave evidence that he had sold his Pajero vehicle some time in 1997 and he did not know what had happenned to the vehicle after he had sold it.

At Bukit Jenalik which was the main base of the Al-Ma'unah group the said three Pajero vehicles which were green in colour were found with the registration numbers of ZB 2253 (exh. P85] ZB 1621 (exh. P860 and ZB 2297 (exh. P96). The evidence of the prosecution witnesses PW44 Sergeant Mohd.

Shah, PW45 Major Fadzil, PW56 Major Loc Hamaca and PW30 ASP Azman Salim confirmed the presence of these three green Pajero vehicles at Bukit Jenalik. The comparison of the chassis numbers of the three Pajero vehicles with their respective vehicles registration cards confirmed that two of the said vehicles were the vehicles reported lost by PW4 and PW5 and the other Pajero being the one sold by PW9.

Through the evidence of prosecution witnesses PW15 Sergeant Abdul Wahab, PW16 Private Mohd. Shaari, PW17 Private Mohd. Rofin and other army personnels they all said they saw the members of the Al-Ma'unah group that seized the military weapons at Post 2 and Camp 304 using the said three green Pajero vehicles with plate numbers beginning with "Z". All these evidence in my view when connected to with one another would point to a conclusion that the two Pajero vehicles that were reported lost and the other Pajero vehicle sold by PW9 had been used by the accused persons as members of the Al-Ma'unah group for the purpose of committing the offence at the said two army camps. These three Pajero vehicles were used to load in all the military weapons that had been seized at the said two camps.

(iii) The Renting Of A House For A Temporary Occupation

PW7 Harun bin Mohamed Yasat in his evidence stated that at the end of the month of June 2000 he had rented out his house at Kampung Kati, Kuala Kangsar to a group of people whom he did not know their true identity. This fact is supported by the evidence of PW6 Padzilah bin Musa. In court both PW6 and PW7 identified one of the members of the Al-Ma'unah group who came to rent out the said house as OKT1. PW6 gave evidence that OKT1 met him to inquire about the availability of a house to be rented out. PW7 stated that OKT1 had given him an advance payment of three months as rental payment of the said house.

PW7 in his evidence stated that at the time when the friends of OKT1 first occupied the said house he could sense the smell of paint being used to spray something coming from the direction of the said house. This witness also said that he could hear the sound of people present at the said house during the nights. PW7 went on to say that from 29 June 2000 he did not see any more members of the group coming to the said house.

PW8 L/Cpl. Mohd. Idris in his evidence stated that he noticed a lot of cars in the compound of the rented house and that there were some activities taking place at the said house. This witness suspected something amiss happening and he found out that there was a plastic cover hung at a garage beside the said rented house which served as a wall and covering the space of the said garage.

The above mentioned evidence could lead to an inference that the said rented house was used by the group of the accused persons led by the first accused to repaint the three Pajero vehicles with a green colour for the purpose of using them as military vehicles to mislead the army at the two army base camps at Post 2 Kuala Rhui and Camp 304 Grik whereby a large number of weapons were seized by members of the Al-Ma'unah group. This scene of the event in which the three Pajero vehicles were found to have been used to commit the offence will be highlighted later. The plastic cover found hung at the garage could be said to have been used for the purpose of obstructing the public from having sight of what the members of the Al-Ma'unah group were doing at the said house. The said rented house could also be said to have been used by the members of the Al-Ma'unah group as a temporary place or transit point before they are taken out to their base camp at Bukit Jenalik.

The evidence of PW6, PW7, PW8 were not challenged at all by the defence in cross examination except the question of identification of the accused persons.

(iv) The Purchase And Collection Of The Swords Called "Parang Kembar"

PW14 Tuan Azizah binte Tuan Mat is the owner of the shop at Central Market, Kuala Lumpur selling handicrafts including the swords called "parang kembar". PW14 gave evidence that between the month of March and June 2000 she had sold 87 pieces of the said parang kembar to two persons by the name of Amin and Zahit whom PW14 later identified in court as the OKT1 and Zahit bin Muslim, the second accused (OKT2) respectively. The record of sales which showed the sale of the said parang kembar was produced in court as exh. P9. This evidence showed that the OKT1 and his followers were in the process of collecting weapons including the said parang kembar for the purpose of later executing their mission.

The above facts were not at all challenged by the defence.

(v) Some Of The Accused Persons Were Seen At A Food Stall Immediately Before The Seizure Of The Military Weapons By The Al-ma'unah Group At Post 2, Kuala Rhui Camp

Prosecution witness PW10 Siti Muriani binti Khalid had identified OKT1, the first accused; Jamaludin bin Darus, the third accused (OKT3); Ibrahim bin Dris, the fourth accused (OKT4); Kamarudin bin Mustafar, the ninth accused (OKT9); Abdul Ghani bin Ali, the tenth accused (OKT10); Idris bin Anas, the eleventh accused (OKT11); Riduan bin Berahim, the thirteenth accused (OKT13); Mohd. Roshdi bin Yaacub, the fourteenth accused (OKT14) and Ahmad Sarkawi bin Sulong, the sixteenth accused (OKT16) as being amongst twenty persons who ate at her stall at about 2am in the morning of 2 July 2000. They came to the stall in three Pajero vehicles. The accused persons

present at the food stall ordered eight chicken rice and 12 fried rice and 20 cups of coffee. PW10 also identified OKT1 as the person who ordered the food and OKT9 as the person who made the payment towards the food ordered at the stall. The surroundings of the food stall at that point of time was lighted by the lights from the stall and the street light. In the circumstances PW10 could see what was happening on that early morning.

A question may be posed as to how PW10 having seen those accused persons for the first time in her life could have identified them. The answer can be found when PW10 in her evidence in clear terms stated that those accused persons wearing army uniforms ate while at her stall in a quiet manner without talking. This appears something unusual to PW10 because she had stated that usually her customers when they were eating would be talking to her and her colleagues working at the said stall. In my view the strange conduct of these group of accused persons present at the food stall had enable her to recollect well what had actually happened with regard to their presence at the said food stall.

It is my finding that the credibility of PW10 is not shaken at all having seen the evidence given by her. This witness had testified in detail and in clear terms what had happened on that early morning. I find her to be an honest and reliable witness. Furthermore I find PW10 as a witness she is not an interested witness at all. It must be stated here that the evidence given by PW10 is relevant to show that those accused persons identified by her at the food stall represented later to be some of those accused persons involved in the seizure of the military weapons at the said Post 2, Camp Kuala Rhui and Camp 304, Grik.

(vi) The Collection Of Military Weapons By Way Of Seizure At Post 2, Kuala Rhui Camp

Prosecution witness PW15 Sergeant Abdul Wahab bin Awang Kechik, a platoon Sergeant from E Company, Battalion 304, Grik Camp stationed at Post 2, Kuala Rhui Camp in his evidence gave detailed account of what had happened in the early morning of 2 July 2000 at the said Post 2, Kuala Rhui Camp. PW15 had testified that there were about 15 to 20 persons in army uniforms entering Post 2 at about 2.50am on 2 July 2000. These 15-20 persons in army uniforms came into the compound of Post 2 in three green coloured Pajero vehicles using military registered plate numbers beginning with the alphabet 'Z'. PW15 had stated that seeing the manner in which the group of persons came into the camp by way of military vehicles, the way they dressed in full army uniforms and having heard the way they spoke and gave command had made him and his men believed that these group of people were from the military. PW15 and his men were made to believe that there would be an examination of the military weapons to be conducted at the camp as told to

them by one of the group of persons who had just entered their camp. Considering the fact that a number of these group of persons that came into the camp were dressed as higher ranking military officers all the directions and commands given to PW15 and his men were followed without any question or objection.

PW15 also testified that because he and his men were not in proper army uniforms when these group of persons came into the said camp they were punished by the said group of persons by commanding them to do acts such as pumping front support, walking like a duck, frog jumping, forward roll etc. According to PW15 these group of persons dressed in full military uniforms had seized various type of military weapons including wireless and radio sets kept at the store at the said Post 2 army camp. The evidence of PW15 as to what happened at the said camp when these group of persons came therein is amply corroborated by the evidence of his men stationed at the camp such as prosecution witnesses PW16, PW17, PW18, PW19, PW20, PW21, PW22, PW23, PW24, PW25, PW26 and PW27. All these prosecution witnesses in their evidence had also testified to the fact that the M16 rifles provided to each of them were also seized by the said group of persons.

PW15 and PW23 in their evidence stated that they could not identify those group of persons who came into the said Post 2, Kuala Rhui Camp because the situation on that early morning of 2nd July 2000 was dark when the incident took place. As a result of the incident that took place at the said Post 2, Kuala Rhui Camp PW15 lodged a police report as in exh. P12.

(vii) The Collection Of Military Weapons By Way Of Seizure At Battalion 304, Kem Grik

PW28 Lance Cpl. Syed Hizaidhail bin Syed Fadhail gave evidence that on the morning of the incident on 2 July 2000 involving the seizure of the military weapons at the said Battalion 304 or Camp 304 as is commonly referred to by the army personnel serving at the said Camp he was on duty as a forward sentry at the sentry post at the entrance into the said Camp. Together on duty with PW28 was PW29 Private Muhamad Rozi bin Noh who was performing the duty of a night guard at the guard room. There were lights fixed at the guard room situated near to the sentry post. The sentry post was not lighted. However ray of lights from the guard room lighted the area around the sentry post. PW28 in his evidence stated that at about 4.15am on 2 July 2000 he saw three green coloured Pajero vehicles entering the said Camp 304. One of the Pajero vehicle stopped near a building called Bilik Gerakan inside the said Camp 304. The second Pajero vehicle stopped in front of the guard room and the third Pajero vehicle stopped near an office building called military transport or MT inside the said Camp 304.

When the three Pajero vehicles arrived at the said guard room PW29 opened the gate to allow them in. According to PW29 the Pajero vehicle at the front most gave signal by raising its high beam lights for three times wherein to this witness he understood it to mean a signal that a high ranking military officer is present inside the vehicle. PW29 further stated that a man in full military uniform later came out from the vehicle and introduced himself as an officer to PW29 and that he was going to conduct an on the spot check at the said Camp. Soon after that PW29 saw four other men in full military uniforms coming out from the said vehicle. One of these four men was seen holding the rank of Major in the army and the said Major stated that there was an emergency spot check to be conducted. PW29 also testified there were about 15 to 20 persons that came in to the Camp in that said three Pajero vehicles on that morning of 2 July 2000.

After being told that there was going to be an on the spot check at the said Camp 304 PW29 requested that he be allowed to contact his duty officer PW37 Lieutenant Mohd. Nizam bin Hussain but was refused by the said man with the rank of Major. Both PW28 and PW29 stated that based on the military uniforms worn, the vehicles used and the manner these group of people who came into the said Camp spoke had made them believed that these group of persons were in fact from the army. PW28 had given evidence that the so-called officer with the rank of Major wanted to go to the ammunitions store and had directed him to open the lock to enter the said ammunition store inside the Camp. This witness had followed the orders given in the belief that there was in fact an on the spot check done at the said Camp bearing in mind that the officer giving orders was a high ranking military officer. In the circumstances PW28, PW29 and their colleagues PW34, PW35, PW36 had testified that they did not at all object to the request and orders made to them while these group of persons dressed in full military uniforms were inside the Camp.

The prosecution witnesses PW34 Cpl. Mat Shariff bin Napi, PW35 L/Cpl. Soaid bin Hamid and PW36 L/Cpl. Baharin bin Md. Lazini corroborated the evidence relating to the incident that took place at Camp 304. They gave evidence that they assisted the group of persons dressed in army uniforms that came into their Camp to remove the military weapons and equipment from the stores to be loaded into the said three Pajero vehicles. These prosecution witnesses also testified that the M16 rifles provided to each of them were also seized by the group of persons in army uniforms. Prosecution witnesses PW28 and PW29 in their evidence stated that they saw these group of persons in army uniforms while they were inside Camp 304 were armed with the M16 rifles (believed to be seized from Post 2, Kuala Rhui Camp). PW28 and PW29 further testified that they could identify two of the members of the group

dressed in army uniforms that entered Camp 304, Grik on that early morning. They identified OKT1 as the person who was impersonating as an army Major and OKT3 impersonating as an army officer holding the rank of Lieutenant Colonel when the two of them were inside the said Camp 304.

(viii) The Recovery Of Military Weapons And Equipment At Bukit Jenalik

As regards the recovery of military weapons and equipment at Bukit Jenalik various findings could be made from the evidence adduced by the prosecution as follows:

(a) PW56 Major Loc Hamaca bin Haji Nawi had confirmed the fact that he found various military weapons and other equipment at the main base of the Al-Ma'unah group where all the accused persons had assembled and later captured at Bukit Jenalik on 6th July 2000. PW56 was the head squadron of the 'U' Commando of the security forces involved in the so-called "operation suboh" and sent to recover the seized weapons from the Al-Ma'unah group. Amongst the weapons found are the M16 rifles, M203, GPMG, LMG, bullets and other military equipment.

(b) PW30 ASP Azman Salim the investigating officer of this case in his evidence stated that he had received all the military weapons and other equipment found at Bukit Jenalik from PW56. PW30 later lodged a police report specifying all the weapons seized from the accused persons at Bukit Jenalik and taken possession of by him as shown in the said police report exh. P55.

(c) In this court all the prosecution witnesses who are members of the armed forces serving at the said two army camps at Post 2, Kuala Rhui and Camp 304 Grik when shown the various military weapons and other equipment and verifying them with the records kept (exhs. P144 and P153) and the serial numbers of the relevant weapons confirmed that these military weapons and equipment were those seized from the said two camps in the early morning on 2 July 2000.

(d) The relevant prosecution witnesses who are army personnel serving at Camp 304 identified OKT1 and OKT3 as the persons impersonating and holding the rank of Major and Lieutenant Colonel respectively when the two of them were inside the said Camp 304. By reference to the evidence of PW10 again it is to be noted that she too had also identified OKT1 and OKT3 as amongst the group persons who had stopped earlier to eat at her food stall in the early morning on 2 July 2000.

(e) The prosecution witnesses PW44 Sergeant Mohd. Shah bin Ahmad and PW45 Major Fadzil bin Tajuddin had identified all the accused persons as members of the Al-Ma'unah group present at Bukit Jenalik. Some of

the accused persons were earlier identified by PW10, PW28 and PW29 and these accused persons happened to be amongst the accused persons present at Bukit Jenalik.

(f) The three Pajero vehicles found at Bukit Jenalik were found to be similar to the three vehicles as seen by the relevant prosecution witnesses at Camp 304, Grik and at Post 2, Kuala Rhui. All the relevant prosecution witnesses identified these three vehicles as the said three green coloured Pajero vehicles using the army registration plate beginning with the alphabet "Z".

(g) There is only a short gap in the time period taken between the happening of the various incidents in this case beginning with Post 2 Camp at Kuala Rhui at around 2.50am on 2 July 2000 whereby the relevant prosecution witnesses had stated in evidence of the event relating to the seizure of military weapons and equipment at the said Camp that took place for about 40 minutes. Then at about 4.15am the same morning on 2 July 2000 another event involving the seizure of military weapons and equipment took place at Camp 304 Grik whereby its distance from Post 2 Camp Kuala Rhui took only about half an hour drive. If we were to look back again at the evidence of the prosecution witness PW10 we find that she too had said that she saw a group of persons wearing army uniforms coming to eat at her food stall at about 2.30am on the same day 2 July 2000.

All the above mentioned findings showed that the evidence given by the relevant prosecution witnesses appeared to be consistent for the purpose of linking one incident to that of another incident. It would be unrealistic to state that what had happened at the said two military camps were unconnected with the recovery of military weapons and equipment at Bukit Jenalik and that they were a mere coincidence. At Bukit Jenalik where the accused persons had gathered it was also found epaulettes of various ranks in the army and name tags which could be linked to the use of ranks and name tags worn by members of the Al-Ma'unah group responsible for the entry and the seizure of the military weapons and equipment at the said two army camps. The question that can be posed is why should the members of the group used the epaulettes and the name tags which are not their real names. The answer must be to enable the accused persons who entered the said two army camp to disguise themselves as army personnel in order to deceive those army personnel serving at the said two camps.

Based on the above findings the court could make an inference that the group of persons responsible for the seizure of the military weapons and equipment at Post 2 Kuala Rhui and Camp 304 must be the group of Al-Ma'unah members comprising most of the accused persons that had gathered, camped and finally detained by the security forces at Bukit Jenalik.

(ix) Bukit Jenalik Being Made The Base Of Operation Of The Accused Persons

According to the prosecution witness PW45 Major Fadzil bin Tajuddin the Al-ma'unah group consisting of the accused persons had camped in at Bukit Jenalik and used it as their base of operation. PW45 is an officer from the Commando Group (Gerak Khas) who heads the army "Inner Cordon" group assigned to capture the accused persons and to retrieve all the military weapons and equipment that were seized from the said two army camps.

As an experienced army officer in planning war strategy PW45 testified that from the tactical point of view Bukit Jenalik is an area that is suitable to be made as a defence fortress based on its high terrain and its position that can command control over the surrounding areas. With the presence of two streams running across the said Bukit Jenalik it is suitable to be used as a fortress because the two streams would provide the source of water supply. The observation and the view made by PW45 as regards the strategic position of Bukit Jenalik is further supported by the evidence of the other members of the armed forces assigned to cordon the areas where the accused persons had camped as their base of operation. These army personnel had stated that they found difficulty to enter into the camp and take position that is suitable for the purpose of capturing the accused persons. Every time they wanted to come near to the position where the accused persons had camped they were attacked repeatedly from the direction where the accused persons had stationed themselves. This is because the group comprising the accused persons were on the higher ground on the hill and were in a better position to see the movement taking places below it.

At Bukit Jenalik the Al-Ma'unah group comprising the accused persons were found to have dug up trenches to serve as their defence wall against their enemy. The evidence of PW44 Sergeant Mohd. Shah and members of the armed forces who had cordoned Bukit Jenalik confirmed the presence of these dug-up trenches. The presence of these dug-up trenches around Bukit Jenalik where the Al-Ma'unah group had camped had not been challenged by the defence. In fact this court together with the members of the prosecution team and the defence counsels along with the accused persons had made a visit to the scene of the incident at Bukit Jenalik in the midst of the trial of this case and it is confirmed that during the said visit by the court that these dug-up trenches were still to be seen therein.

Evidence Relating To The Waging Of War Against The Members Of The Security Forces

The evidence adduced by the prosecution showed that the members of the Al-Ma'unah group consisting of the accused persons had gathered at Bukit Jenalik to stage a war or insurrection against the Government by way of force and violence as follows:

(i) The Punishment And The Killing Inflicted On The Hostages

PW43 ASP Abdul Rahman bin Ishak, the Special Branch Chief of the Kuala Kangsar Police Headquarters gave evidence that he received information from the Kampung people relating to the sound of gun explosion heard from the area behind the Primary School at Bukit Jenalik on 3 July 2000. PW43 then sent three police detectives comprising Detective Cpl. Abdullah Jaafar, Detective Cpl. Sagadevan and Detective Sgt. Mohd. Shah (PW44) to investigate the said area. PW40 Abdul Halim bin Mohd. Aroff, the village Headman for Kampung Jenalik confirmed that he heard the shooting coming from the hill at the back of the said Primary School at about 1.30 noon on 3 July 2000.

The prosecution has also proven through the evidence adduced that PW44 and detective Cpl. Sagadevan were later captured and held as hostages by the Al-Ma'unah group made up of the accused persons on trial in this case. The evidence of PW44 Sgt. Mohd. Shah is vital in this case because this witness saw most of the action and of the incident taking place involving the accused persons at Bukit Jenalik. PW44 himself went through the ordeal of being kept under captivity as a hostage by the accused persons for four days and three nights.

PW44 in his evidence had narrated the event at Bukit Jenalik as to how he was punished and tortured together with his colleague Detective Cpl. Sagadevan. PW44 identified OKT1 together with five or six other accused persons as being those members of the Al-Ma'unah group who had punished and tortured him and Detective Cpl. Sagadevan by way of hitting their bodies with the rifle butt of the M16, kicking, shouting, firing gun shots close to their ears and inflicting other form of punishment. PW44 was not in a position to identify all the other accused persons other than the OKT1 as the person who had punished and tortured him because he was in the state of complete fear at that point of time. PW44 had stated that OKT1 had told him that he (PW44) was a spy and had threatened to shoot him with the M16 and M203 weapon twice. At the time when OKT1 threatened to kill PW44 OKT1 had asked PW44 how many religious teachers or ulamak the witness PW44 had killed. This fact showed the nature of the struggle of the Al-Ma'unah group which is of hatred against the Government of the day.

PW44 also stated in evidence that he and Detective Cpl. Sagadevan together with another civilian hostage named Jaafar Putih were directed to dig up trenches around the area of the hill at Bukit Jenalik to serve as a fortress for the Al-ma'unah Group to challenge against the security forces. During the period they were digging the trenches PW44 stated they were well guarded by members of the Al-ma'unah Group who were armed with the M16 rifles. PW44 also stated that around the trenches that they had dug up were placed

GPMG weapon for the purpose of attack against the security forces. Some of the accused persons were also seen holding M16 rifles near the dug up trenches doing guard duties.

PW44 had identified all the 19 accused persons on trial as being members of the Al-ma'unah Group that were present at Bukit Jenalik when he was captured. I find no reasons to doubt the evidence of PW44 on this aspect of identification. This is because as earlier stated PW44 had been captured and detained at Bukit Jenalik for four days and three nights. During this period PW44 had witnessed for himself what happened at Bukit Jenalik and he had observed the behaviour and the action of the accused persons. Furthermore there were some amongst the accused persons who had been seen talking to him while he was under captivity. There was also an incident wherein PW44 had recalled that OKT14, the fourteenth accused person had shown to him the manner as to how OKT14 had "locked" the area where the Al-ma'unah Group had camped at Bukit Jenalik using their so-called charms and mystical powers to prevent their camped area from being attacked by the security forces. On the last day of his captivity on 6 July 2000 PW44's hands were not tied any more to the tree at Bukit Jenalik and this witness was allowed to move freely and was present through out the day with the accused persons.

PW44 had testified that the accused persons found at Bukit Jenalik headed by OKT1 had committed the most brutal act of shooting and killing a member of the Armed Forces who was captured and later identified as Trooper Mathew anak Medan. This incident was also witnessed by PW61 Muhamad Nukhshah Bandi Bin Che Mansor (The 27th accused who had pleaded guilty to the alternative charge). PW61 in his evidence before this court had given a detailed account of the incident relating to the shooting and killing of Trooper Mathew. According to PW61 he was present close to OKT1 and other accused persons when this incident took place on 4 July 2000. At first PW61 stated that he heard not less than three gunshots and soon after that he saw one foot of Trooper Mathew covered with blood. This witness also saw OKT1 interrogating Trooper Mathew and questioning him how many people had come along with him. Thereafter PW61 himself witnessed OKT1 directing the fifth accused (OKT5) to shoot Trooper Mathew. PW61 then saw OKT5 shot Trooper Mathew at the back of his body wherein Trooper Mathew fell on the ground in pain and later died.

It is admitted that PW61 is an accomplice and as such there is the need to be cautious in accepting his evidence. The question of weight to be attached to the evidence of an accomplice is well settled and decided in a number of cases. In the case of *Public Prosecutor v. Haji Ismail* [1940] 9 MLJ 76 on the issue of accomplice evidence his Lordship Cussen J at p. 79 had this to say:

> There is no question of the mechanical application of any general rule of presumption. When it is a question of this particular presumption the credibility of the witness who is in the position of the accomplice must be individually judged just as any other witness, the same consideration being applied with the added one that he is an accomplice. The Court must consider who and what he is, his demeanour bearing, the manner and quality and substance of his evidence in itself and in relation to all the circumstances of the case. The nature, quality and degree of his complicity must be examined. Then finally the Court must form its opinion whether he is to be given credit and his evidence accepted without corroboration or not.

In the Evidence Act itself it is provided that an accomplice shall be a competent witness against an accused person. Section 133 of the Evidence Act provides as follows:

> an accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

It is my finding that this witness PW61 had not expected any favour or advantage to be given to him by the prosecution arising from him giving his evidence for the prosecution considering the fact PW61 himself had been sentenced to ten years imprisonment by this court for pleading guilty to an alternative charge of an offence under s. 122 of the Penal Code. On the procedure to be followed after some of the accused persons in this case including PW61 had pleaded guilty to the alternative charge while some other persons remained on trial on the principal charge I am guided by the principles and the procedure as laid down in the case of *Yap See Teck v. Public Prosecutor* [1983] 1 CLJ 97 ([1983] CLJ (Rep) 953) wherein his Lordship Mohamed Azmi J (as he then was) at p. 99 (at p. 955) had this to say:

> Having considered the two authorities, it is my view that where a co-accused pleads guilty before the commencement of trial, it is desirable for the Court to enquire whether the prosecution or the remaining co-accused wish to call him as their witness. If either the prosecution or the defence intimated that they wished to do so, I think it is desirable in the interest of justice that the Court should not postpone sentence, but should proceed to dispose of the case before removing him altogether from the Court. But if neither party requires him as a witness, sentence should be postponed until after the trial against the remaining co-accused has been completed.

In the present case the prosecution had intimated to this court that two of the co-accused persons who had pleaded guilty to the alternative charge under s. 122 of the Penal Code were required by the prosecution as their witnesses. The two co-accused persons required as prosecution witnesses are the seventh accused who gave evidence as PW60 and the twenty-seventh accused who gave evidence as PW61. It is on this ground that I had proceeded to pass sentence on the accused person who had pleaded guilty to the said alternative charge.

The learned counsels for all the accused persons who are still on trial under the principal charge had submitted that following from the plea of guilty of the accused persons under the alternative charge I should disqualify myself from further hearing the case on the ground that arising from the said plea of guilty the prosecution had tendered the facts of the case involving those who had pleaded guilty which had been accepted by them without any qualification. On this ground the learned counsels for the accused persons submitted that this court would appear to be biased and prejudiced against the remaining accused persons on trial. For this reason it was urged that the remaining accused persons' case should be tried before another judge. I could not agree with this contention because it is my view that even if the remaining accused persons are to be tried before another judge, it would still be open to the prosecution to elicit from those who had pleaded guilty the facts of the prosecution case including the fact that they had pleaded guilty to the said alternative charge (see the case of *Yap See Teck v. Public Prosecutor (supra)*). I must also state here that I had reminded myself that under no circumstances shall this court be influenced or swayed by the facts of the case presented by the prosecution against those accused persons who had pleaded guilty to the alternative charge in deciding the guilt of the remaining accused persons on trial under the principal charge. The finding of guilt or not of the accused persons on trial must be decided strictly on the evidence presented by the prosecution as a whole and the defence if any put up by the accused persons. The finding of guilt of the accused persons can only be made on the burden of proof that the prosecution has proven its case against the accused persons beyond all reasonable doubt and no reliance can be placed on the facts of the case presented by the prosecution against the co-accused persons who had pleaded guilty to the alternative charge.

It is also my finding that the prosecution is not relying solely on the evidence of PW61. In fact the evidence of PW61 is corroborated in material particulars on various aspect given in the evidence of PW44, Detective Sgt. Mohd. Shah bin Ahmad. PW44 had stated on that afternoon when Trooper Mathew was captured he heard a number of gun shots coming from the direction on the top of the hill at Bukit Jenalik and he also heard voices asking Trooper Mathew something to the effect that how many like him had come. After that PW44 said that he was called to bury a human corpse whom PW44 found to be the dead body of an armed forces personnel in full military uniform. PW44 had also stated that he saw the foot of the said soldier covered with a lot of blood. PW44 further testified that he saw the name tag on the shirt worn by the said soldier bearing the name Thew. I therefore find the evidence of PW44 as being consistent relating to time, place, the sound of gun shots, identity and the uniform worn by the victim. The relatively short space of time between the happening of the events seen by the two prosecution witnesses PW44 and

PW61 as to what had happened to Trooper Mathew would assist the Court very much in making an inference as to who was responsible for the killing of Trooper Mathew. The evidence of PW44 showed that there is the presence of a strong circumstantial evidence to corroborate the evidence of PW61. On this point I would like to refer to the case of *Public Prosecutor v. Dato' Seri Anwar Ibrahim* [1999] 2 CLJ 215 wherein his Lordship Augustine Paul J at p. 315 had this to say:

> It was held in *R v. Mullins* [1848] 3 Cox 526 that corroboration does not mean that there should be independent evidence of that which the accomplice relates otherwise the accomplices' testimony would be unnecessary. In the celebrated case of the *King v. Baskerville* [1916] 2 KB 658, Lord Reading CJ said that what is required is some additional evidence rendering it probable that the story of the accomplice is true, and that it is reasonably safe to act upon his statement. His Lordship said at page 667:
>
> > We hold the evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed but also the prisoner committed it.
>
> The word 'implicate' does not necessarily mean 'incriminate' or 'inculpate', it may mean only 'involve' (see *R v. Kerim* [1998] 1 QDR 426). Ong CJ (Malaya) said in *Brabakaran v. PP* [1966] 1 MLJ 64 that corroborative evidence is not necessarily restricted to the oral evidence of an independent witness. It may be circumstantial as well as direct. In *Donne v. the Queen* [1990] 171 CLR 207, it was held that consistent with its role of confirming other evidence rather than amounting itself to evidence which necessarily leads to conviction, the corroborative evidence does not need to be proven beyond reasonable doubt.

Again on the meaning and object of corroboration in the case of *Public Prosecutor v. Datuk Haji Harun Idris* [1977] MLJ 15 his Lordship Raja Azlan Shah FJ (as his Royal Highness then was) at p. 19 had stated as follows:

> The object of corroboration is no doubt to satisfy the Court that the witnesses are telling the truth and that it is reasonably safe to act upon them. It is not necessary that the corroboration should be of the actual commission of the crime, then there would be independent evidence of the commission of the offence, it would be enough corroboration if there is independent evidence of relevant circumstances connecting the accused with the crime.

Apart from the killing of the armed forces personnel Trooper Mathew, PW44 also witnessed the killing of his colleague Detective Cpl. Sagadevan on 5 July 2000. PW44 had narrated the event as to how when he and Detective Cpl. Sagadevan were tied to a durian tree at Bukit Jenalik he saw the sixth accused

Abu Bakar bin Ismail (OKT6) was shot but PW44 could not identify who had shot OKT6. Soon after OKT6 was shot PW44 saw OKT1 running towards him (PW44) and immediately after passing through him PW44 heard a number of gun shots fired near the place where he was seated. After hearing the said gun shots PW44 saw some broken pieces of the head skull of a human being scattered around him. PW44 also stated that he saw spots of human blood and broken pieces of human flesh white in colour which he believed to be human brains on the ground around him. PW44 himself was directed by the members of the Al-Ma'unah group to bury the dead body of Cpl. Sagadevan whom he came to know later had died as a result of gun shots he heard earlier.

Another person who had been held as a hostage by the accused persons at Bukit Jenalik was a civilian named Jaafar bin Putih. Jaafar bin Putih had passed away before the trial in this case commenced. Therefore he could not be subpoenaed as a witness to throw light as to what had happened when he was held under captivity at Bukit Jenalik. Nevertheless the prosecution has brought in the statement of the late Jaafar bin Putih recorded by the police in the course of the investigation of this case under s. 112 of the CPC to corroborate the evidence of PW44. The statement of Jaafar bin Putih is tendered as exh. P156. The position in law as regards the admissibility of written statement given by a person who is already dead has been clearly spelt out under s. 32(1)(i) of the Evidence Act as follows:

> Statements, written or verbal, of relevant facts made by a person who is dead or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable are themselves relevant facts in the following cases:
>
> (i) when the statement was made in the course of, or for the purposes of an investigation or inquiry into an offence under or by virtue of any written law and
>
> (j) …

On the weight and degree to be attached to a statement made by the late Jaafar bin Putih in the present case I would like to refer to the case of *Public Prosecutior v. Mohd. Jamil bin Yahya* [1993] 3 MLJ 702 wherein his lordhsip KC Vohrah J at p. 702 had this to say:

The weight and degree to be attached to a statement by a declarent under section 32(1) of the Act who is patently not disinterested must be examined with the greatest of caution, more so when an accused faces a charge carrying a mandatory death sentence upon conviction.

From the decision of the abovementioned case it is clear that the statement of Jaafar bin Putih is relevant and the weight to be attached rests with this Court in deciding it. In this respect in my view the question is to what extent the evidence of the witness PW44 can be corroborated by the statement of Jaafar bin Putih. In the case of *Lim Yow Choon v. Public Prosecutor* [1972] 1 MLJ 295 on this point his Lordship Azmi LP in delivering the judgment of the Federal Court stated as follows:

> … In our opinion, the answer to the first question is that the cautioned statement in the circumstances of the case must be regarded as forming part of the prosecution case.

Looking at the statement of the late Jaafar bin Putih as in exh. P156 it is evident that the deceased had witnessed for himself as to how Detective Cpl. Sagadevan was shot by the first accused. The deceased Jaafar bin Putih had described every moment of the event before Detective Cpl. Sagadevan was shot until the scene when Detective Cpl. Sagadevan was shot dead by the first accused. I find the statement given by the deceased Jaafar bin Putih is consistent with the evidence given by PW44 Sergeant Mohd. Shah in material particulars.

From my observation of the demeanour of the witness PW44 at the witness box I find him to be an honest and truthful witness. Although PW44 went through a lengthy and relentless cross examination by the learned defence counsels for the accused persons the evidence of PW44 remained consistent and unshaken. The evidence given by PW44 relates to events which he himself experienced through out his captivity by the Al-Ma'unah Group at Bukit Jenalik. In the Privy Council case of *Bhojraj v. Sita Ram and Others* [1936] PC 60 the court in that case at p. 60 *inter alia* had this to say:

> The real test for either accepting or rejecting the evidence of a witness are how consistent the story is with itself, how it stands the test of cross examination and how far it fits in with the rest of the evidence and the circumstances of the case.

In the case of *Muniandy v. Public Prosecutor* [1966] 1 MLJ 257 His Lordship Ong Hock Thye FJ at p. 258 stated as follows:

> It must, however, be observed that being unshaken in cross-examination is not *per se* an all sufficient acid test of credibility. The inherent probability or improbability of a fact in issue must be the prime consideration.

I am of the view that the facts relating to the punishment and killing of the said two members of the security forces are relevant to show a continuous act of the group comprising the accused persons in committing the act of waging war against the authority. Section 6 of the Evidence Act has clearly provided the circumstances under which these facts become relevant in a given case. Section 6 of the Evidence Act provides as follows:

Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction are relevant, whether they occurred at the same time and place or at different times and places.

Illustration:

(b) A, is accused of waging war against the Yang di-Pertuan Agong by taking part in an armed insurrection in which property is destroyed, troops are attacked and goals are broken open. The occurrence of these facts is relevant as forming part of the general transaction though A may not have been present at all of them.

(ii) The Attack On The Members Of The Security Forces By The Al-Ma'unah Group

PW47 Sergeant Ukoon anak Pungkok was a member of the Rangers Unit of the Armed Forces involved in the so-called "Ops Subuh" assigned to cordon off the area where the accused persons had gathered at Bukit Jenalik. PW47 had testified that he was shot and wounded on his left shoulder when he was doing a close reconnaissance of the location where the accused persons had camped at Bukit Jenalik. The group of accused persons were seen by PW47 to have launched a continuous attack with the weapon M16 towards him and members of his troops and as a result of that attack PW47 suffered the said injury.

PW48 Trooper Lance/Cpl. Zainol Mansor was an army Commando involved in the said "Ops Subuh". The evidence of PW48 showed that the group of accused persons in this case had fired continuous shots towards the members of his troops every time he tried to get close to the base where the accused persons had gathered. This witness confirmed that the shots fired by the said group of accused persons came from the various type of weapons comprising the M16, M203 and GPMG. PW48 also stated that the members of his troops did not first commence firing towards the enemy front. This was because the command received by them from their superior PW45 Major Fadzil bin Tajuddin was only to shoot under circumstances to defend themselves and when asked to do so by PW45 from time to time. The witness PW48 further testified that a member of his troops named Trooper Mathew went missing when they were doing the close reconnaissance towards the enemy base of the accused persons at Bukit Jenalik. This fact was corroborated by the evidence of PW61 Muhamad Nukshah Bandi bin Che Mansor who stated in his evidence that Trooper Mathew was shot dead by a member of the group of the accused persons.

PW45 Major Fadzil bin Tajuddin gave evidence as the head of the Commondo Group ("Gerak Khas") whereby he was the officer leading 110 of his men involved in the so-called operation Subuh to cordon the area around Bukit Jenalik where all the accused persons had assembled. The evidence of PW45

showed that the members of the Al-Ma'unah Group comprising the accused persons had fired the shots using the M203 weapon directed towards the members of the security forces. The shots from this M203 weapon had fallen on a playing field at the Bukit Jenalik Primary School nearby (see exhs. P158 A-G). This witness had given evidence that the resultant effect of the shots fired from the M203 weapon is that it could kill any human being present at a distance of around 50 meter radius and the dangerous distance that could cause injury would be around 100 meter radius.

PW45 had also in his evidence rejected the contention that the shots from the M203 weapon were fired by the security forces who were then cordoning the area. This is because PW45 had stated that he had heard the sounds of the shots coming from the enemy position where the group of accused persons had assembled. Furthermore PW45 had stated that he had directed his men to shoot only when they are attacked and to fire shots in the air when necessary to do so.

I am of the view that the action taken by some of the accused persons to use the M203 weapon is to show clearly the challenge made by them against members of the security forces and that they were prepared to kill anybody who challenged them without considering the possibility that the use of the M203 weapon could kill people or cause injury to the members of the public. PW45 also stated that he had heard shots from the weapon GPMG fired by the group of accused persons. According to PW45 the GPMG had an effective shooting range of a distance of about 1800 meters when it is used with a tripod and its 7.62 mm type of bullet can cause serious injury to a human target.

PW45 had heard the gun shots fired from the location where the accused persons had camped at Bukit Jenalik from the time they cordoned off the area at Bukit Jenalik on the morning of 4 July 2000 until the midnight on 5 July 2000. The continuous shots fired by the group of accused persons using various type of weapons had made it difficult for members of the security forces to fulfill their mission to capture them. It is clearly shown that the accused persons had given a strong resistance against the security forces so much so that it is found that a member of the armed forces Trooper Mathew was killed and a few others injured.

PW45 had also stated that appeals through the loud hailers were made to the accused persons to surrender but instead they reacted by attacking members of the security forces to show their resistance. PW45 further stated that he had heard some of the group of the accused persons shouting that they would not surrender.

It is my finding that all the above narrated evidence showed that the accused persons did not have the intention at all to surrender themselves to the security forces until 6 July 2000 wherein by then they had found out that they had been cordoned off at Bukit Jenalik and after some of them had been shot by the security forces. It was only at that time that some of the accused persons expressed their willingness to surrender. I am of the view that if the accused persons wanted to surrender at the outset on the first day the area of Bukit Jenalik was cordoned off by the security forces they could have done so but in this case they have chosen not to do so. There is evidence adduced in this case by PW61 Muhammad Nukshah Bandi bin Che Mansor that there were some members of the Al-Ma'unah group who manage to escape and run away from the said group on the first day of their gathering after having discovered something not right was happening at Bukit Jenalik. It is also to be noted that there is no difference in situation between on the first day Bukit Jenalik was cordoned off on 3 July 2000 and on the last day it was cordoned off on 6 July 2000. If the accused persons were said to have been scared to surrender themselves on 3 July 2000 because of fear of being shot by the security forces who were cordoning off the area the question that may be posed is that why then on 6 July 2000 beginning in the morning on that day there were some accused persons who had come down to surrender to the security forces. These accused persons could have been shot under the circumstances but the truth remained that they surrendered safely to the members of the security forces.

(iii) Other Type Of Weapons Recovered And Seized From The Base Of Operation Of The Accused Persons At Bukit Jenalik That Can Be Used For The Purpose Of Waging War

PW56 Major Luc Hamaca in his evidence stated that besides the military weapons M16, M203, LMG and GPMG recovered at Bukit Jenalik, other type of weapons were also recovered and seized at the time when all the accused persons were captured at Bukit Jenalik. PW56 confirmed that he saw some self made explosive materials that can be said to be improvised explosives at Bukit Jenalik. These explosive materials are made up of PVC pipes that have been cut into pieces of 3" long. However, these explosive materials had been directed by PW56 to be destroyed by exploding them in view of the fact that they were dangerous. PW56 also found crossbows and the swords called "parang kembar" in large quantities at the said base in Bukit Jenalik. The detailed list of items recovered at Bukit Jenalik where the accused persons had camped can be seen in the police report exh. P55.

(iv) Attack At Various Places In Petaling Jaya, Shah Alam And Batu Caves

PW60 Shahidi bin Ali the seventh accused person in this case who pleaded guilty to the alternative charge gave evidence that three members of the Al-ma'unah Group who had gathered at Bukit Jenalik including himself were directed by OKT1 to return to Kuala Lumpur. According to PW60 he was

informed by one of them who returned to Kuala Lumpur named Roslan that OKT1 had directed them to execute their mission in bombing various places such as the Carlsberg Brewery Factory at Shah Alam, the Guiness Anchor Brewery Factory at Petaling Jaya and the Hindu temple at Batu Caves, Selangor. This direction made by the first accused can be said to be in line with the contents of his conversation made through the radio telecommunication received by PW37 in exh. P151 which is the transcript of the content of the said conversation between the caller OKT1 and PW37 Lt. Mohd. Nizam who was the duty officer of Camp 304 on 2 July 2000.

PW60 in his evidence stated that he and his two other colleagues had carried out the direction made by OKT1. In the early morning on 3 July 2000 PW60 and his colleague Roslan had gone to the site near the Carlsberg Brewery Factory at Shah Alam to conduct the bombing on the said factory. According to PW60 Roslan had carried out the task of bombing the said factory by firing two shots at it from the M203 weapon which resulted in a power failure to the factory. Soon after that they went to the site where the Guiness Anchor Brewery Factory is located and Roslan fired some shots towards the said factory but they did not explode. PW60 also testified with regard to the bombing at the temple in Batu Caves wherein according to PW60 Roslan had fired three shots with the M203 weapon towards the temple and he heard three loud explosions taking place.

I find the evidence given by PW60 to be consistent and not merely making up stories of his own. The learned Counsels of the accused persons did not cross-examine at all this witness as regards the shooting that took place at these three separate places. As it had been stated earlier the principles of law on this point is that the failure to cross-examine on the essential issues raised would tantamount to accepting the truth of the witness testimony. Although PW60 as a witness appears to be an accomplice nevertheless there exists a number of factors that would enable this court to accept the evidence of this witness as being true as follows:

(a) PW60 did not obtain any advantage from the evidence he gave on the ground that he had been convicted on the alternative charge and duly sentenced.

(b) The demeanour of PW60 showed that he is a truthful and honest witness.

(c) The evidence of PW60 was not challenged at all by the defence.

(v) The Shooting Made Towards The Cable Tower Of The Tenaga Nasional Berhad (TNB) Installation At Lata Kekabu

PW53 Chief Inspector Dzulkifli Abdul Ghani as one of the investigating officers in this case gave evidence that he investigated the alleged shooting of the TNB cable tower by members of the Al-Ma'unah group at Lata Kekabu,

Lenggong, Perak immediately after the incident in this case took place at Bukit Jenalik. PW53 testified that he found the effects of firearms shooting done at the cable tower of the said TNB installation at Lata Kekabu whereby the glass connection to the cables at its top and below levels were broken. According to this witness with the aid of a metal detector he discovered three ammunition shelfs of the M203 weapon nearby the said TNB installation. PW53 also stated that he found the effect of firearms shooting done by a weapon on the steal cable tower by virtue of the fact that he saw a bent and a curve on the said steel tower. PW53 in his evidence stated that the distance between Lata Kekabu and Bukit Jenalik where the group of accused persons had assembled is about 20 to 25 kilometer. The effect of the firearms shooting made on the said cable tower at Lata Kekabu can be seen on the photographs taken and produced as exhs. P160 (A-V). I am of the view that this incident of shooting showed a strong possibility that the group comprising the accused persons could have been the people responsible for the shooting of the said cable tower. The motive of this shooting incident can be said to be to cause a blackout of the supply of electricity to the areas provided through the said cable tower of the TNB installation at Lata Kekabu.

The Purpose Or Intention With Which The Group Of Accused Persons Assembled Is To Challenge The Government's Authority And To Set Up An Islamic State

It is my finding that the conduct and action demonstrated by the group of accused persons in this case would show that they had carried out their struggle or mission towards challenging the government's authority and the setting up of an Islamic State through "jihad" that is against the Constitution of the country. Such conduct and action of the group of accused persons can be identified and listed as follows:

(i) PW45 Major Fadzil bin Tajuddin had given evidence that he had heard the war cries of "Allahu Akhbar" and "jihad" uttered by the accused persons at Bukit Jenalik. According to PW45 these war cries are meant to instill or inspire the confidence of the Al-ma'unah members to be more aggressive to continue with their struggle for "jihad".

(ii) At Bukit Jenalik when all the accused persons were captured it was recovered from the scene books and pamphlets in the form of a call for the continuation of the Al-ma'unah Group's struggle or "jihad". There were also books which contained the techniques of the use of weapons and war strategies as can be seen in the exhibits produced as exh. P112 (1-16).

(iii) PW44 Sergeant Mohd. Shah gave evidence that when OKT1 came to know that PW44 and detective Cpl. Sagadevan are members of the police force OKT1 became fierce and angry. OKT1 thereafter started to punish and torture the two of them. OKT1 had also asked PW44 how many Muslim

religious teachers or "ulamak" he had killed and how many Pas Meetings or talks (Pas is a registered political party in Malaysia) that had not been approved with the required permit.

(iv) PW44 heard the war cries of "Allahu Akhbar" after hearing a shot immediately before PW61 heard OKT1 directing OKT5 to shoot Trooper Mathew at Bukit Jenalik. PW47 Sergeant Ukoon anak Pungkok also heard the war cries of "Allahu Akhbar" when he was attacked with shots fired by the group of the accused persons at Bukit Jenalik when he was doing the close approach towards the position where the accused persons had camped.

(v) According to a number of prosecution witnesses a majority of the accused persons were seen wearing a head gear made of cloth wrapped around their head called "serban". PW30 ASP Azman Saidin, one of the investigating officers in this case confirmed that he recovered 30 pieces of these "serban" at the scene in Bukit Jenalik which were produced as exh. P110 (3). Although wearing a serban around one's head by itself is not indicative of anything, in the present case it can be said that with almost all the accused persons wearing the serban and having assembled at a given place it can be safely said that by their conduct they were pursuing for a common cause.

The Evidence Of Communication By Way Of Radio Set Made By A Member Of The Group Of Accused Persons To The Army Camp 304, Grik To Show The Objectives Of Their Struggle

PW44 Sergeant Mohd. Shah in his evidence stated that when he was held under captivity at the base where the accused persons had camped at Bukit Jenalik he did see a radio-set equipment similar to the one produced as exh. P19 which was shown to him in court. PW44 further stated that at Bukit Jenalik he saw OKT1 using a radio-set similar to exh. P19. This evidence was not challenged at all by the defence in cross-examination. The position in law with regard to the failure of the defence to cross examine a prosecution witness on a crucial part of the case has been dealt with in a number of past decided cases. In the case of *Wong Swee Chin v. Public Prosecutor* [1981] 2 MLJ 212 his Lordship Raja Azlan Shah CJ (His Royal Highness as he then was) on this point at p. 213 had this to say:

> A correct statement of this law is that failure of the defence to cross-examine the prosecution witnesses on the matter merely goes to the credibility of their testimony, to wit, the fact that they found the ammunition in the appellant's trousers pockets remains unshaken. On this point we need only to say there is a general rule that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony.

PW37 Lieutenant Mohd. Nizam bin Hussain was the duty officer at camp 304 Grik on 3rd July 2000. PW37 in his evidence testified at 4.55pm on 3 July 2000 he received a call through the radio-set communication made by an unidentified caller. The prosecution had produced the transcript of the conversation between the caller and PW37 as in exh. P151 which was recorded by PW37. PW37 also stated that the caller had used the language code used in the army in his conversation. According to PW37 only members of the Armed Forces who had attended a training in signals communication would be familiar with and knew how to use the said language code. This witness PW37 further stated that the first few words uttered by the caller were "Khalifah Mujahidin Malaysia". In the conversation made the caller amongst others had stated as follows:

mengenai senjata kalau anda mahu terima penuh tuntutan mencari kerelaan Allah.

(English Translation)

As regards weapons if you want accept in full the claim in search of god's blessing.

According to the witness PW37 the caller also mentioned that they wanted an Islamic State ruled under the law of the Quran. In the transcript of the conversation between the caller and PW37 as recorded in exh. P151 there were also mentioned the following words:

Kami hanya mahu pulun anggota polis dan PM.

(English Translation)

We only want to finish members of the police and PM.

PW38 Lance Cpl. Hussin bin Ismail was the radio-set operator at the military Camp 304 Grik on 4 July 2000. At about 8.25am on 4 July 2000 PW38 also received a call through the radio-set from a caller who refused to identify himself. PW38 recorded the contents of the conversation from the said call which is produced as exh. P152 and its transcript exh. P152A. The witness PW38 in his evidence stated that amongst the words spoken by the caller includes the following:

Senjata digunakan untuk sementara waktu. Apa keputusan anda. Minta dihantar balik. Bagi pihak Mujahidin tidak kisah. Kami tak kisah. Kami akan jihad ke jalan Allah.

(English Translation)

The weapon is used for the time being. What is your decision. Ask to send back. On behalf of Mujahidin do not mind. We do not mind. We shall struggle (jihad) in the name of Allah.

SP38 also testified that he had previously worked with the first accused who had once served in the army as signals operator at Camp 304 Grik. PW38 further stated that the secret codes of the Signals Division in the said Camp 304 are only known to the signal operators who worked therein. The evidence of this witness showed that only those who had served with the Signals Division and who have been a signal operator and had attended training in the presentation of communication by way of radio signals could present the information or message in the manner as done by the unidentified caller in this case.

Having analysed the evidence adduced with regard to the two above mentioned calls made by the said unidentified caller to the said Camp 304, Grik I am of the view that a number of findings could be made as follows:

(i) It is evidently clear that the said two calls made through the military radio-set were made immediately within 1-2 days after the two arms heist incidents at the said Post 2 Kuala Rhui Camp and Camp 304 had taken place in the early morning of 2 July 2000. The two dates when the two calls were made were also found to be between the period of the two arms heist incidents and before the group of accused persons were captured by the member of the security forces on 6 July 2000.

(ii) A soldier attached at Post 2 Kuala Rhui Camp PW16 Private Mohd. Shaari bin Hussin in his evidence stated that the radio-set and its accessories (exhs. P19 to P25) were seized at the said Post 2 Kuala Rhui Camp in the early morning of 2 July 2000. PW30 ASP Azman Salim in his evidence as the investigating officer of this case stated that the said radio-set and its accessories that were seized were recovered at Bukit Jenalik where the group of accused persons had gathered and camped. From the evidence of these two prosecution witnesses PW16 and PW30 an inference can be made that the caller of the said two calls came from the group of accused persons present at Bukit Jenalik.

(iii) The evidence of PW44 Sergeant Mohd. Shah that he saw OKT1 using a radio-set at Bukit Jenalik reinforced the contention that the caller came from OKT1.

(iv) The evidence of PW38 showed that OKT1 had previously worked with PW38 as a signal radio-set operator and OKT1 knew how to use the military codes in this radio-set signal communication. OKT1 as a former radio-set operator who had worked before at the said Camp 304 must also be taken to have known matters pertaining to the frequency of the radio-set used.

(v) There is also evidence adduced relating to the book on telegraph procedures which was found and seized from the possession of the group of accused persons at Bukit Jenalik as can be seen in the exhs. P112 (1-16).

(vi) The caller had amongst others in the conversation with PW37 and PW38 mentioned about the weapons and the question as to whether the said weapons were to be sent back. This showed that the caller had the knowledge regarding the arms heist incidents at the said two army camps.

(vii) The caller had referred himself as "Khalifah Mujahidin Malaysia". PW1 L/Cpl. Hidzir in his evidence did state that OKT1 was the leader of the Al-Ma'unah group. PW1 had also referred to the head of the Al-Ma'unah group in Terengganu as "Khalifah". He also stated that the word Khalifah in the Al-Ma'unah group means a leader. If we were to refer to p. 30 of the book entitled "Tentera Allah Di Bumi Malaysia" which is produced as exh. P166 there is a reference to the words "daripada Khalifah Mujahidin Malaysia". PW59 ASP Abdul Razak had confirmed that this book Exhibit P166 was given to him by OKT1 at Bukit Jenalik before OKT1 was captured therein. An inference can be made from this evidence that the caller was OKT1 who is known as "Khalifah" of the Al-Ma'unah group and who also identified himself as Khalifah Mujahidin Malaysia.

(viii) The struggle and the demand made by members of the Al-Ma'unah group is to set up an Islamic State which can be seen from the contents of the book exh. P166 which outlined the elements of their struggle or jihad. If we were to make a close study of the contents of exh. P166 in particular at p. 8 of the said book and compared it with the recorded transcript of the conversation of the caller as in exh. P152 we will find that there are similarities in the contents of the said two documents.

Based on the above findings and connecting them with one another there is only one irresistible conclusion that could be made by this court in that the caller who made the said two calls must have come from OKT1.

Whether Evidence Of Statement Made To The Witnesses Who Received The Call From The Radio-Set Amount To Hearsay Evidence

The law relating to hearsay evidence is that any evidence in the form of hearsay cannot be accepted as evidence and remained inadmissible if admitted. Nevertheless there are exceptions to the rule as can be seen in a number of decided cases. In the case of *Subramaniam v. Public Prosecutor* [1956] 22 MLJ 220 it was held *inter alia* that evidence of a statement made to a witness by a person who is not himself called as witness may or may not be hearsay.

It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The fact the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or some other person in whose presence the statement was made.

In the case of *Chandrasekaran & Ors. v. Public Prosecutor* [1970] 1 MLJ 153 on the application of the law relating to hearsay evidence his Lordship Raja Azlan Shah J (His Royal Highness as he then was) at p. 155 had this to say:

> So far as the evidence of PW55 is concerned it fully incriminated appellant No. 1. His evidence consisted of the conversation that took place between himself and this appellant, the part he played in pursuance of the conspiracy and what Leong Chye Kee had told him. The learned president admitted hearsay evidence by PW55 regarding what Leong had told him – Leong had since disappeared – but, be it noted, merely as explaining the relevant conduct of PW55 and not to prove the truth of the statements.
>
> … Leong is untraced. He was not a witness in the case. Whatever statements he had made to PW55 were admitted, not for the purpose of establishing the truth of the facts alleged, but to show the state of mind and conduct of Leong and PW55 and to draw inferences therefrom.

In the Privy Council case of *Leith McDonald Ratten v. The Queen* [1972] AC 378 the court therein on the application of the principles of hearsay evidence at pp. 386 and 387 had this to say:

> The telephonist was cross-examined by counsel for the appellant, and the Chief Justice directed the jury as to the significance of her evidence and on the question whether they should accept it as establishing that the voice was that of the deceased woman. The matter was again debated in the Full Court and their judgment contains a careful passage in which the adequacy of the direction by the trial judge was examined and endorsed. Their Lordship must therefore proceed with the appeal on the basis that the jury was properly directed that, on the evidence, they might find that the telephone call at 1.15pm or thereabouts was made by the deceased woman.
>
> The next question related to the further facts sought to be proved concerning the telephone call. The objection taken against this evidence was that it was hearsay and that it did not come within any of the recognised exceptions to the rule against hearsay evidence. In their Lordships' opinion the evidence was not hearsay evidence and was admissible as evidence of fact relevant to an issue.
>
> The mere fact that evidence of a witness includes evidence as to words spoken by another person who is not called, is no objection to its admissibility. Words spoken are facts just as much as any other action by a human being. If the

speaking of the words is a relevant fact, a witness may give evidence that they were spoken. A question of hearsay only arises when the words spoken are relied on "testimonially", ie, as establishing some fact narrated by the words.

From the principles enunciated in the decision of *Ratten*'s case hereinbefore mentioned and applying it in the context of the present case it is my view that the evidence of the caller is relevant not for the purpose of proving the truth of the statement made but to show the fact that there were in fact calls made by someone to PW37 and PW38 and to prove to the court that the caller was OKT1. I am of the view the fact of proving that the caller came from OKT1 is relevant because the available evidence already adduced by the prosecution at that stage had shown that the events involving the accused persons had a very close nexus with the incidents relating to the two calls made to the said Camp 304 Grik.

When the evidence clearly showed that it was OKT1 who made the said two calls it strengthened the prosecution's contention that the main objective of the group of accused persons is to overthrow the government of the day by way of force and for the purpose of setting up an Islamic State. This fact is evidenced by the contents of the conversation in the two calls made through the said radio-set as recorded in the transcript of the conversation in exhs. P151 and P152 and thereafter reading them together with the book exh. P166 which contained the reading materials on "jihad" which is the struggle to overthrow the government.

Knowledge Or *Mens Rea*

The learned counsels of all the accused persons in this case have raised the question of absence of knowledge on the part of most of the accused persons with regard to the intention of staging an insurrection or to challenge directly against the government's authority. For this reason it was submitted that the prosecution has failed to show the element of *mens rea* in the commission of the offence.

Knowledge like intention is question of fact which may be inferred from the surrounding circumstances of the case. It is my considered view that looking at the surrounding circumstances of the case it would be unreasonable and untenable to make a finding that none of the accused persons in this case knew of their intention to stage an insurrection or a struggle to set up an Islamic State. If we were to unfold one by one the incidents that took place in this case commencing from the weapons seized at Post 2 Kuala Rhui Camp until the killing of hostages and the exchange of firearms shooting that took place at Bukit Jenalik, it is quite clear we will find that each of the accused person at the very least at any given point of time knew the nature of their struggle and had voluntarily pursued the said struggle to set up an Islamic State.

It has to be noted in this case that as early as 3 July 2000 all the accused persons had witnessed the capture and detention of two members of the police force and a civilian man. They could see the torturing and punishment inflicted on the said two members of the police force and the said civilian man. How could there be a training to be conducted with the army or attending a spiritual course at Bukit Jenalik as claimed by the accused persons when the accused person themselves had witnessed the most cruel act had been committed on the said hostages. Subsequently on 4 July 2000 the accused persons had also witnessed the brutal killing inflicted on the army personnel Trooper Mathews who had earlier been captured at Bukit Jenalik. The accused persons could see how cruel OKT1 was and they did nothing to prevent Trooper Mathews from being killed. Prosecution witness PW61, a member of the Al-Ma'unah group had testified how Trooper Mathews had pleaded with OKT1 by crawling on the ground with his injured foot that had been shot that he would not be shot again and killed. Would a sensible man having witnessed such an incident like this says that he did not know anything and merely follow the dictates and orders of OKT1. It would be untenable for the accused persons to allege that they did not witness this tragedy. The incident took place in the area they had gathered and camped. The fact that they heard the sound of gun shots and the plea made by the victim Trooper Mathews not to harm him surely goes to show that the accused persons knew what was actually happening around them.

The accused persons had also witnessed the brutal and senseless killing of Detective/Cpl. Sagadevan on 5 July 2000. There were some members amongst the accused persons who had directed PW44 Sergeant Mohd. Shah to bury the dead body of Detective/Cpl. Sagadevan. This incident should have made the accused persons realised something was wrong somewhere. What is the purpose of having a member of the police force and a member of the army brutally killed at Bukit Jenalik. It is not disputed from the evidence adduced that there was exchange of firearms shooting between the members of the accused persons and members of the security forces. The group of accused persons had also witnessed some of their colleagues had been shot and one of them named Halim killed in the shooting incident. This incident at all cost cannot be equated to be a sort of military training. In addition it is also in evidence that there were some amongst the accused persons who were seen doing sentry duties guarding their fortress at Bukit Jenalik. There were also trenches seen being dug out at Bukit Jenalik to serve as their line of defence against attack by the security forces.

It is my view that as early as 2 July 2000 those accused persons who did not agree with what OKT1 was doing, they could have left Bukit Jenalik and took the step towards abandoning their attendance for the so-called spiritual course. In fact it has been shown by way of evidence that there were some members

of the Al-Ma'unah group who had earlier assembled at Bukit Jenalik had left Bukit Jenalik after having found something was not right therein when they saw a lot of military weapons brought to the place. This fact was elucidated through the evidence of PW61 during cross-examination by the defence. Therefore it can be said for those members of the Al-Ma'unah group who left Bukit Jenalik as early as 2 July 2000 they knew of the insurrection staged by OKT1 and his Al-Ma'unah group was against the law and they did not want to be involved in the said insurrection. In the circumstances of this case the action of the accused persons in remaining with the OKT1 to stay on with the fight against the members of the security forces showed that they had the *mens rea* to pursue the struggle along with their leader. The shots fired and the attack made by the accused persons on the members of the security forces showed that their challenge was aimed towards the objective of causing the collapse of the government of the day and to replace it with the setting up of an Islamic State.

The Role Played By The Accused Persons

It is my finding that through the evidence of PW44 Sergeant Mohd. Shah it has been shown that during the period of his captivity as a hostage at Bukit Jenalik he had witnessed the fact that some of the accused persons had been assigned to guard their fortress at the dug-up trenches and holding firearms. PW44 had also testified that he had seen a group of the accused persons doing sentry duties at various places at Bukit Jenalik. From the decision of the past decided cases hereinbefore cited it is quite clear that the specific role played by an accused person in a rebellion or in the staging of an insurrection as in the present case is not a vital ingredient to be proved. All the accused persons as members of the Al-Ma'unah group who had gathered at Bukit Jenalik regardless of their degree of involvement are responsible in the commission of the offence of waging war against the Yang di-Pertuan Agong.

It is also my view that the question of whether the accused persons had been threatened by OKT1 to commit the said offence of waging war against the Yang di-Pertuan Agong does not arise in this case. This is because the position in law with regard to offence under s. 121 of the Penal Code is that the evidence of threat or compulsion cannot be used as a defence. This is provided by s. 94 of the Penal Code which states as follows:

> Except murder and offences included in Chapter VI punishable with death, nothing is an offence which is done by a person who is compelled to do it by threats, which, at the time of doing it, reasonably cause the apprehension that instant death that person will otherwise be the consequence:
>
> Provided that the person doing the act did not of his own accord, or from a reasonable apprehension of harm to himself short of instant death, place himself in the situation by which he became subject to such constraint.

The offence of waging war against the Yang di-Pertuan Agong under s. 121 of our Penal Code is classified as on offence against the State under Chapter VI of the Penal Code and punishable with death. Therefore under s. 94 of the Penal Code for the accused persons in the present case threat or compulsion coming from OKT1 is not a defence to a charge they are facing. On this point a reference to the book *Ratanlal Law of Crimes* at p. 476 had this to say:

> For offences against the state punishable with death … The section provides that compulsion is not a defence to a charge under it, but it may operate in mitigation of punishment according to the circumstances of a case.

In the case of *Aung Hla and Others v Emperor (Supra)* the court in that case at p. 241 on the same point *inter alia* stated as follows:

> The doctrine of compulsion cannot be pleaded by way of a defence to a charge under section 121 but the same may be considered in determining the punishment that ought to be inflicted.

The Second Element – The Waging Of War Is Against The Yang Di-Pertuan Agong

From the evidence hereinbefore adduced by the prosecution I find that the prosecution has proven that the insurrection or the challenge to the government's authority committed by the accused persons had been directed against the Yang di-Pertuan Agong in his capacity as the head of State. The said insurrection or challenge in my view had been demonstrated by way of the cumulative conduct and actions taken by the accused persons as a whole which had been extensively dealt with before this and which can be briefly restated as follows:

(i) The seizure of military weapons in the two army camps at Post 2 Kuala Rhui and Camp 304 Grik.

(ii) The shooting and the attack made by the accused persons on the members of the security forces at Bukit Jenalik.

(iii) The torturing and the killing of the police and army personnel at Bukit Jenalik.

(iv) The war cries of "Allahu Akhbar" heard during the period the accused persons were engaged in the war with members of the security forces showed that their struggle was towards the setting up of an Islamic State by way of force. Their struggle had also been voiced by way of the radio-set communication made to the members of the armed froces at Camp 304 Grik as shown in exhs. P151 and P152 which contained threat of attack to be made in the country.

(v) The bombings carried out by members of the Al-Ma'unah group including some of the actions taken by the accused persons at various places in Shah Alam, Petaling Jaya and Batu Caves in Selangor.

(vi) The shooting of the cable wires of the TNB Tower and electricity installation at Lata Kekabu.

The Identification Of The Accused Persons

The prosecution has proven that all the accused persons involved in this case have been positively identified by the two prosecution witnesses PW44 and PW45. On the other hand some of the accused persons such as OKT1, OKT2 and OKT3 being the leaders among the Al-Ma'unah group and playing a key role in various events occurring in this case had also been positively identified by the other relevant prosecution witnesses which had been earlier dealt with by this court.

There is no doubt that PW44 Sergeant Mohd. Shah who was held under captivity as a hostage and who went through the ordeal for almost four days and three nights at Bukit Jenalik could identify almost all the accused persons who had assembled and camped at Bukit Jenalik to carry out their mission. PW45 Major Fadzil on the other hand had testified that altogether 28 accused persons were detained and brought to him on 6 July 2000. These 28 accused persons represented the members of the Al-Ma'unah group who had challenged and fought with the members of the security forces from the time the members of the security forces had cordoned the area of Bukit Jenalik. PW45 had stated that he was the officer in charge in the operation involving the inner cordon of Bukit Jenalik. All movement and the capture of the accused persons at Bukit Jenalik was under his supervision and responsibility. The total number of 28 accused persons does not include the twenty first accused person Megat Mohd. Hanafi who had pleaded guilty to the alternative charge and whom according to PW45 was the accused person that was injured at the scene in Bukit Jenalik and was brought to the hospital straight away without being brought to him. PW44 had positively identified all the accused persons including all the nineteen accused persons being tried under this principal charge under s. 121 of the Penal Code.

***Prima Facie* Case Made Out**

Having regard to the totality of the evidence adduced by the prosecution and after having considered carefully the submission of learned counsels for all the accused persons and the prosecution, I am satisfied at the close of the prosecution case that the prosecution has made out a *prima facie* case against all the accused persons. It is my finding that the prosecution has proven the essential ingredients of the charge against all the accused persons for the offence under s. 121 of the Penal Code. I thereby ordered all the nineteen accused persons to enter their defence on the charge framed against them.

When the three alternatives were explained to them OKT1 elected to remain silent and the remaining 18 accused persons elected to give evidence on oath. However it must be stated here that six of the 18 accused persons later at various stages of their respective defence case changed their stand and elected to give their statement from the dock instead of giving their evidence under oath. This court allowed their request to change their choice of presenting their defence case after having explained to them again the evidential value the court would attach and the weight to be given to their statement from the dock when compared to evidence given under oath.

Case For The Defence

Before dealing with the defence of each of the accused persons it would be appropriate for me to refer to the provision of the law as regard what the court would have to consider at the end of the defence case or at the conclusion of the trial. Section 182A Criminal Procedure Code reads as follows:

> (1) At the conclusion of the trial, the court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt.
>
> (2) If the court finds that the prosecution has proved its case beyond reasonable doubt, the court shall find the accused guilty and he may be convicted thereon.
>
> (3) If the court finds that the prosecution has not proved its case beyond reasonable doubt the court shall record an order of acquittal.

It is clear that at the end of the trial the court will have to weigh all the evidence that had been adduced and to make a ruling whether the prosecution has proved its case beyond reasonable doubt or otherwise.

Having weighed the evidence if the court is satisfied that the prosecution has proved the charge beyond reasonable doubt, the court will have to find the accused guilty of the charge and thereafter convict him. On the other hand if the court rules that the prosecution has not proved the charge on the evidence adduced against the accused, then the accused will be acquitted and discharged. In other words, at the end of the trial the court will have to rule whether the defence has raised a reasonable doubt as to the truth of the prosecution's case or the guilt of the accused. This is because a case which has been proved beyond reasonable doubt in itself involves the absence of a reasonable doubt. In support of the said proposition reference may be made to the case of *Mah Kok Cheong v. R* [1953] 19 MLJ 46 where his Lordship Spencer Wilkinson J at p. 47 stated the following:

> … in ordinary Criminal cases … all discussions as to what might reasonably be true or what is consistent with innocence are both irrelevant and misleading. Almost every defence put forward by an accused is consistent with innocence or it would not be put forward or would it be a very good defence if it could not be reasonably be true. But whatever may be the defence to a criminal charge the sole question which a subordinate has to ask itself at the conclusion of the trial is – Does the defence raise a reasonable doubt as to the truth of the prosecution case or as to the accused's guilt? I say "the sole question" advisedly because in this country the accused will not have been called on for a defence at all unless the prosecution have first proved a case …

What is "reasonable doubt" has been discussed by his Lordship Sharma J in the case of *Public Prosecutor v. Saimin & Ors* [1971] 2 MLJ 16 where his Lordship at p. 17 stated the following:

> It is not mere possible doubt, because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which after the entire comparison and consideration of all the evidence leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the change.

In the case of *Liew Kaling v. Public Prosecutor* [1960] 26 MLJ 306 his Lordship Thomson CJ in delivering the judgment of the Court of Appeal in reference to the quantum of proof "beyond reasonable doubt" adopted the passage from the judgment of Denning J (as he then was) in the case of *Milter v. Minister of Pensions* [1947] 2 All ER 373 and had this to say:

> That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable' the case is proved beyond reasonable doubt but nothing of that will suffice.

As to the meaning of the burden of proof by the accused in cases where it is necessary for him to rebut the prosecution case against him and how the law is to be applied I need only refer to the celebrated case of *Mat v. Public Prosecutor* [1963] 29 MLJ 263 wherein his Lordship Suffian J (as he then was) *inter alia* held that if the court accepts the explanation given by or on behalf of the accused, it must acquit. But this does not entitle the court to convict if it does not believe that explanation, for he is entitled to an acquittal if the explanation raises a reasonable doubt as to his guilt, as the onus of proving his guilt lies throughout on the prosecution. If upon the whole evidence the court is left in a real state of doubt, the prosecution has failed to satisfy the onus of proof which lies upon it.

I shall now deal with the defence of each of the nineteen accused persons on trial and give my findings at the close of their defence case. In this case OKT1 has chosen to remain silence and did not call any witness on his behalf to support his case.

Position In Law When The First Accused Remained Silent

I have already ruled that at the end of prosecution case, the prosecution has made out a *prima facie* case where the prosecution has already proved the essential ingredients of the charge against the first accused. What it means in reality is that the prosecution has established the charge based on credible evidence as opposed to a situation where at the conclusion of the trial the case is said to have been proved beyond reasonable doubt in which case the word doubt refers to doubt which is raised by evidence adduced by the defence during the defence case. Therefore when the first accused chooses to remain silence or not to call evidence the court can lawfully convict him.

In the present case the first accused had been tried together with the other eighteen co-accused persons. I find as a fact that the court had been presented with evidence by the other co-accused persons involving the first accused on various aspect of the incidents in this case and all the evidence were pointing to him as the man responsible in leading the Al-Ma'unah group in doing such overt act against the government in the name of "jihad".

At the conclusion of the trial taking the evidence adduced as a whole before the court I am satisfied beyond reasonable doubt as to the first accused guilt on the charge framed against him. It is my finding that the prosecution has proved beyond reasonable doubt all the essential ingredients of the offence under s. 121 of the Penal Code against the first accused. **I therefore find the first accused guilty and convicted him accordingly**. In convicting the first accused various findings can be made on him on the evidence adduced which can be briefly stated as follows:

(1) He was responsible for the purchase of army uniforms that were used by members of the Al-Ma'unah group to disguise themselves as military personnel when they entered the two army camps at Post 2 Kuala Rhui and Camp 304 Gerik.

(2) He was responsible for the acquisition of three Pajero vehicles and having the vehicles repainted green in colour to be used for the arms heist at the said two army camps at Post 2 Kuala Rhui and Camp 304 Gerik.

(3) He was the person who rented out a house at Kampung Kati, Kuala Kangsar to be used as the place for the repainting of the said three Pajero vehicles in green colour. The said rented house was also used by the first accused as a transit point for some of the Al-Ma'unah members before they were sent to Bukit Jenalik.

(4) He was responsible for the purchase and collection of the swords called "parang kembar" which were bought from a handicrafts shop at the Central Market, Kuala Lumpur.

(5) He was the person who led the members of the Al-Ma'unah group in the collection of military weapons by way of seizure at the said two army camps at Post 2 Kuala Rhui and Camp 304 Gerik.

(6) He was responsible for bringing the military weapons and equipment and other type of dangerous weapons to Bukit Jenalik and making Bukit Jenalik as the base of operation of the accused persons.

(7) He was responsible for the execution of the punishment and the killing inflicted on the hostages at Bukit Jenalik.

(8) He led the members of the Al-Ma'unah group in the attack on members of the security forces at Bukit Jenalik.

(9) He directed the attack in the bombing of various places at Petaling Jaya, Shah Alam and Batu Caves in Selangor.

(10) He was responsible for the shooting made towards the cable tower of the Tenaga Nasional Berhad at Lata Kekabu, Lenggong, Perak.

(11) By his own conduct he had demonstrated that as the undisputed leader of the Al-Ma'unah group gathered at Bukit Jenalik he had carried out the struggle or mission towards the setting up of an Islamic state through "jihad" that is against the Constitution of the country. Books and pamphlets in the form of a call for the continuation of the Al-Ma'unah group's struggle or "jihad" were recovered from the scene at Bukit Jenalik.

(12) He was responsible for making the call by way of radio-set communication to the army Camp 304, Gerik to show the objectives of the struggle of the Al'Ma'unah group.

Unsworn Evidence From The Dock

Six of the remaining eighteen accused persons elect to give unsworn statement from the dock as their defence. The position in law is that the right of an accused person to make an unsworn statement from the dock is a substantive right. However we must bear in mind that statement from the dock is not sworn evidence which can be the subject of cross examination. Not so much weight can be given to what the accused said in the dock when compared to what the accused would give under sworn evidence. This is so because when a man gives evidence one can cross-examine him and test his evidence and generally have a better opportunity of assessing him. Nevertheless the law is very clear that the court cannot outright reject such evidence. The court must consider it and give it such weight for what it is worth and think fit having

regard to the evidence adduced as a whole before the court. (See the cases of *Public Prosecutor v. Senassi* [1970] 2 MLJ 198 and *Muhammad Salleh v. Public Prosecutor* [1969] 1 MLJ 104].

The tenth accused (OKT10) the twelfth accused (OKT12), the fifteenth accused (OKT15), the sixteenth accused (OKT16), the seventeenth accused (OKT17) and the twenty fourth accused (OKT24) had given their statements from the dock. From their statements given the following relevant facts common to all the six accused persons can be adduced as follows:

(1) All the six accused were present at Bukit Jenalik at the time when the Al-Ma'unah members were arrested by the authority.

(2) All the six accused contended that they did not know the intention of OKT1 from the very beginning and had put the blame on OKT1 as the person responsible in the arms heists, taking hostage of army and police personnel and the overt act against the government forces.

(3) All six of them contended that they went to Bukit Jenalik to attend "kursus kerohanian peringkat tertinggi" or a high level spiritual course and they had been told that they were going to have a joint exercise or training with the military force.

(4) All six of them had suspected something was wrong when they saw police personnel and a civilian were taken hostage and being tied up to a durian tree. They also found military weapons and ammunition in a large quantity and no programs related to "kursus kerohanian" were held at Bukit Jenalik even though they contended that their intention to go to Bukit Jenalik was to attend kursus kerohanian.

(5) On the evening of 1 July 2000, all the six accused said they saw OKT1 had gathered all the Al-Ma'unah members who were present at Bukit Jenalik for a briefing where OKT1 had chosen about 15-20 of them for a mission. OKT1 gave a set of military uniforms to each of the members who were chosen to follow him for the mission and had asked them to wear it during the said mission. Three green Pajero vehicles were used that night.

(6) All of them had contended that OKT1 did not tell them of their destination that evening on 1 July 2000.

(7) All of them stated that they saw all types of military weapons and ammunition were brought to Bukit Jenalik on the morning of 2 July 2000. OKT10 also stated that he was involved in taking away boxes containing military equipments and saw few of the military personnel from the two army camps at Post 2 Kuala Rhui and Camp 304 Gerik assisting them to carry those items into the three Pajero. OKT12 and OKT16 said that they

saw some of their group members were involved in painting/spraying the Pajero vehicles with green colour at the rented house in Kati, Kuala Kangsar.

From the statement given by OKT12, OKT15, OKT16 and OKT17 it is noted that they have not dealt with the arms heist incident committed by the Al-Ma'unah group at Post 2, Kuala Rhui Camp and Camp 304 Gerik. The prosecution in their case presented also did not show that OKT12, OKT15, OKT16 and OKT17 were together with members of the Al-Ma-unah group in the said two army camps. On this matter I accept the fact that OKT12, OKT15, OKT16 and OKT17 did not go to the two said army camps. I also find that OKT24 did not go to the two said army camps. Nevertheless it is an undisputed fact that all five of them OKT12, OKT15, OKT16, OKT17 and OKT24 saw various types of military weapons and ammunition were brought to Bukit Jenalik on the morning of 2 July 2000 by members of the Al-Ma'unah group.

The question posed now is whether the unsworn statement offered by all these six accused persons was sufficient to raise a reasonable doubt on the prosecution case. I am of the view that it is highly improbable that they did not know of what had happened at the two army camps and the incident at Bukit Jenalik. At some point of time they would have knowledge or at least reason to believe that something amiss or seriously wrong had happened.

It could be seen that no attempt or effort was taken by anyone of them to escape from Bukit Jenalik when they discovered that OKT1 has done an illegal act. They witnessed two police personnel, a military personnel and civilian were detained and taken as hostages. They also witnessed these hostages were interrogated and tortured. They did not do anything either to refrain or to advise OKT1 as to his action. They knew that two of the hostages were later killed while in the group custody. I could not accept they could not do anything and were watching helplessly a member of their group committing a heinous crime when their declared intention was to attend a course and at the same time to have training exercise with the military.

They also witnessed the hostages digging trenches around their camp at Bukit Jenalik and the question is why they need to dig those trenches. It is also my finding that they were placed at several strategic point believed to be sentry point in Bukit Jenalik in order to counter any attack by the military force. These six accused persons stated that they came to Bukit Jenalik to attend a "kursus kerohanian" or a spiritual course. I am of the view that as early as 2 July 2000 they would have realised that there were no such "kursus kerohanian" as contended by them after they have been at Bukit Jenalik for several days.

It is my finding that looking at the evidence as a whole presented by the prosecution and the statement of facts adduced by OKT10, OKT12, OKT15, OKT16, OKT17 and OKT24 in their defence all of them knew the purpose or objective of their gathering at Bukit Jenalik. They had knowingly joined OKT1 as the leader of the Al-Ma'unah group in carrying out their struggle through violence or force in the name of "jihad" to overthrow the government of the day. I am of the view the fact that there is evidence to show four members of the Al-Ma'unah group had managed to leave Bukit Jenalik unharmed on 2 July 2000 after the various types of weapon were brought to Bukit Jenalik on that early morning on 2 July 2000 from the said two army camps showed in reality there was no obstacle for any of them to leave Bukit Jenalik and not be involved in the action led by OKT1 if they wanted to do so. It is my finding that OKT10, OKT12, OKT13, OKT16, OKT17 and OKT24 have failed to raise a reasonable doubt on the prosecution case. I am satisfied that the prosecution has proved the charge under s. 121 of the Penal Code against all the said six accused persons beyond reasonable doubt. I therefore find OKT10, OKT12, OKT15, OKT16. OKT17 and OKT24 guilty and convicted them accordingly.

The Case For The Defence In Respect of The Remaining 12 Accused

The accused who chose to give evidence from the witness box were OKT2, OKT3, OKT4, OKT5, OKT9, OKT11, OKT19, OKT20, OKT22, OKT23, OKT25 and OKT29.

There were several defences contended by all these 12 accused persons. Their defence can be divided into two parts, firstly the individual defence contended by each accused person and secondly "common defence" where the nature of the defence put forward by the accused persons is more or less similar.

Element Of Knowledge/*Mens Rea*

All 12 acused persons had contended that there was absence of knowledge whereby they did not know that OKT1 had the intention to fight against the government under the name of "jihad". They contended further that they did not involve themselves at all in the preparation aspect before they went to Bukit Jenalik. To support their contention, they testified that the main purpose they went to Bukit Jenalik was to attend "Kursus Kerohanian" or spiritual course organised by the Al-Ma'unah group. Few of the accused even contended that they did not know where the "kursus" or course was going to take place. All the accused had put the blame on OKT1 as the person who had made all the arrangements and plans to obtain possession of firearms, ammunition and other military equipment from the said two army camps and had used the weapons and ammunition so obtained against the military troops in Bukit Jenalik in furtherance of his mission to topple the government of the day.

I wish to restate here the principle of law on waging war under s. 121 of the Penal Code which I had earlier dealt with during prosecution case. Briefly the law requires prosecution to prove:

(a) purpose or intention with which the gathering assembled.

(b) the object of the gathering must be to attain by force and violence.

(c) the object is of a general nature thereby striking directly against the government's authority.

I am of the view that the element of *mens rea* for the commission of an offence under s. 121 of the Penal Code can be formed at any stage. In the case of *R v. Wilson* which was quoted with approval in the case *Aung Hla and Others v. Emperor (Supra)* it had laid down a very clear principle on this point as follows:

> If an insurrection is to be raised they must provide arms, and they must get them in the best manner they can; they will be ill-disciplined and ill arrayed at the first; but as the insurrection gains ground these things may be acquired and discipline learnt – like to our unhappy rebellion in 1745. How did that begin, with that poor deluded Prince who landed at the head of, I believe, not many more men or better armed or clothed, than you have at this meeting at Strathaven? When he landed upon the coast he was at the head of nobody but the boat's crew who landed him, and some foreign officers and he was joined by a few half naked highlanders. Now I state to you as law, and you will see it is sense, that he and his followers, from the highest to the lowest – every one of them was as guilty as they were at the last hour … (emphasis added).

It is therefore not disputed that the law requires the prosecution to first prove that the accused who joined at the last hour has the knowledge of the object and the intention of the gathering that is to strike against the government's authority. Once this is proven the element of *mens rea* will come into play. For those accused who claimed not to have knowledge of the object when they first gathered, the law also requires the prosecution to prove that at some point of time while they were still in the group the evidence and circumstances reveal that they would have known the intention or object of the general nature.

I am of the view that the contention of absence of knowledge and *mens rea* by all the 12 accused persons should be tested against their own adduced evidence and a reasonable conclusion can be made on them as follows:

(1) All the accused had agreed that they went to Bukit Jenalik voluntarily. Nobody forced them to go to Bukit Jenalik. Few of the accused even said that they were proud for being chosen to join the group. The evidence reveals that they had brought along personal items as though they were

preparing for something for a duration of time. Evidence also reveals that all the accused gathered at Bukit Jenalik from 29 June 2000 until the date they were arrested. As early as the evening of 1 July 2000 the evidence shows that all the accused who were already in Bukit Jenalik were instructed by OKT1 to assemble because he wanted to distribute the military uniforms and to brief the group members about a "project" he has in mind on that night. Other accused even though did not mention specifically about the "project" did state that there was such gathering on the evening of 1 July 2000. OKT2 had stated that in the morning of 2 July 2000 after the group came back from the two camps OKT1 had uttered the words "ini adalah jihad dan siapa yang lari dari jihad boleh dihukum bunuh dan jihad telah bermula" (English Translation – "This is jihad and any one who runs away from jihad can be sentenced to death and jihad has begun") in the presence of all the accused. OKT2 mentioned of this utterance made by OKT1 during his examination in chief and during cross examination of himself. OKT2 also stated that there were few accused persons present when OKT1 said he wanted to attack Chenderoh dam and police station. OKT3 on the other hand said that "kami diarahkan oleh OKT1 untuk meyamar sebagai tentera" (English Translation – "We were directed by OKT1 to disguise ourselves as army personnel"). It is my finding that the above mentioned evidence are very pertinent and it would clearly suggest that there were several instances where OKT1 and the Al-Ma'unah group's intention to fight against the government was made known to all the group members. As early as on 2 July 2000, OKT1 had made it very clear in the presence of all the members as the evidence suggested that his fight against the government is under the name of jihad. It is highly improbable for each of the accused to claim that they did not hear what OKT1 had said. A reasonable inference could be made that those who heard it would tell others about what OKT1 had said to them.

(2) Most of the accused contended that they went to Bukit Jenalik for the purpose of attending "kursus kerohanian peringkat tertinggi" or "advance level spiritual course". But on the other hand all the accused stated that there were no such programs befitting such "kursus kerohanian" throughout their stay at Bukit Jenalik. They further agreed when asked during cross examination that this was unusual because in other previous courses that they had attended organised by the Al-Ma'unah group, there were programs arranged for them even on the very first day. Yet no one ever questioned OKT1 or his close associates about the kursus kerohanian. On the above contention of the accused persons a conclusion can be drawn from the facts and circumstances of the case that they did not ask any question because they already knew of the intention and the reason of why they have to assemble at Bukit Jenalik.

(3) While they were at Bukit Jenalik on 2 July 2000 few of the accused had stated that they were informed by OKT1 that they were going to a military camp to collect weapons and ammunition, and few of the accused contended that they were told by OKT1 that they were going to have training exercise with the military. The evidence also showed most of the accused were wearing military camouflage uniforms while they were at Bukit Jenalik. I am of the view there is no basis for such contention since there were no military personnel with them except OKT3. Furthermore OKT3 had stated that he was on leave during that period and when he joined the group at Bukit Jenalik he was not on official duty as his activities in Al-Ma'unah group was not within his official duties. A question may be posed why must they go to the two camps at the wee hours of the day if it is only to train with the military. Not even one accused can give satisfactory or reasonable explanation to this pertinent question. There was no reasonable explanation given by the accused persons on why they have to wear the military uniforms if it is only to train with the military. The evidence also reveals that there were no military personnel except for OKT3. The only logical answer to this is as what OKT3 had stated that they were directed by OKT1 to disguise as army personnel.

(4) On the morning of 2 July 2000 almost all the accused stated that they could see large quantity of weapons, ammunition and military equipment at Bukit Jenalik. OKT3, OKT4, OKT5, OKT9, OKT11 and OKT19 had admitted that they went to the army camp at Post 2, Kuala Rhui and Camp 304 Gerik. I hold the view that on the above evidence of the accused persons for those who went to the two camps would obviously know that these weapons were wrongfully taken from the two camps. Most of the accused who went to the two camps denied seeing weapons and ammunition except boxes were loaded into their vehicles. Can this fact be accepted considering the large quantity of M16, M203, other types of firearms, ammunition and other military equipment that were found to be in their possession. It is my view that they were not telling the truth. No reasonable explanation was offered by them on why all these weapons were taken from the camps. If it is for the purpose of training with the military no evidence of any military personnel followed them to Bukit Jenalik. It is unbelievable and totally unacceptable that such a large quantity of weapons and ammunition could be taken out easily from the camp by a group of civilian without any military personnel accompanying them. Can their explanation be accepted? There were also no evidence that any military personnel later joined them at Bukit Jenalik and trained the group members. It is my finding that it is highly improbable for all the accused persons not knowing the intention after they have taken possession of large quantity of military weapons and equipment from the two camps.

(5) OKT2, OKT3 and OKT4 admitted that after the military weapons were taken by the group to Bukit Jenalik, they had trained other members of Al-Ma'unah at Bukit Jenalik of how to use the weapons. Few of them even admitted that they were given M16 and were placed at several entries surrounding Bukit Jenalik.

However it is also noted that some of the accused had denied using the weapons and carrying the M16. Their evidence were clearly in contradiction with OKT2, OKT3 and OKT4. On this issue I find that there was no reason for OKT2, OKT3 and OKT4 to lie because their evidence is implicating not only other accused but also themselves. I therefore hold that the credibility of OKT9, OKT11, OKT19, OKT20, OKT22, OKT23, OKT25 and OKT29 who denied this fact if nothing else, is battered and discredited.

(6) Few of the accused had said that they suspected something seriously wrong had happened at Bukit Jenalik but no questions were asked to OKT1 or his close associates to clear their mind or doubt even though they have opportunity to ask.

On the above point I am of the view that failure to ask when something very obvious happened in front of their own eyes left us to ponder. The reasons for not asking was only best known to them. No doubt few of them mentioned that after they came back from the two camps, OKT1 became aggressive and they were afraid of asking him. But there were few of them during cross examination agreed to the suggestions that there were several opportunities for them to ask OKT1 or even OKT2 and OKT3 but they did not do so. The only conclusion that can be drawn is that the accused knew that the weapons were to be used to fight against the government forces. It is very clear from the evidence of all the accused they were just shutting one eye and could not be bothered. They did not bother to do anything to stop the illegal act but instead continued to stay at Bukit Jenalik together with the group. The law is very clear on this issue that if there are no other circumstances suggesting absence of knowledge, the court may infer that the defendant did have the requisite knowledge. On this point I would like to cite the case of *Westminster City Council v. Croyalgrange Ltd and Another* [1986] All ER 352 as the authority for said proposition wherein Lord Brightman in delivering the judgment of the House of Lords at p. 359 had this to say:

> But although such knowledge is an ingredient of the offence ... and although the onus of establishing all the ingredients of the offence must lie on the prosecution, this does not impose the prosecution on undue burden ... the defendant chooses not to give evidence of his absence of knowledge and there are no circumstances which sufficiently suggest absence of knowledge the court may properly infer without direct evidence that the defendant did indeed possess the requisite knowledge.

(7) Few of the accused said that trenches were built around their camp in Bukit Jenalik and OKT1 had asked the hostages to dig the trenches. On this matter the question is why the need to built the trenches. OKT2 in his evidence stated that "gali lubang untuk tujuan pertahanan" which translated means digging trenches for the purpose of defence. This evidence from OKT2 would suggest that the group had done a careful and well calculated plan to fight against the government authorities in order to achieve their mission. There was no indication at that point of time they would want to surrender to the authorities. Only after few days as evidence suggested, when they have no other options then only they decided to surrender. This fact was even admitted by OKT4. When questions were asked whether they knew that the hostages were the one who dug the trenches, few of the accused denied knowing this fact and even to the extent denying knowing the existence of the trenches. I take the view that this evidence is a bare denial because the evidence is very clear from the prosecution witnesses and even a few of the Al-Ma'unah group members had admitted they saw hostages dug the trenches around their camp at Bukit Jenalik. On the presence of these trenches the court itself together with the members of the prosecution team and the defence team along with the accused persons had during the trial of this case visited the scene of the crime and could observe that the said trenches were still to be seen around their main camp at Bukit Jenalik.

(8) Few of the accused had admitted that the group members were placed at several strategic places at Bukit Jenalik. This confirmed the evidence of the prosecution witnesses that several military troops were faced with resistant from the members of the Al-Ma'unah group when they were trying to come near to the group's main camp at Bukit Jenalik. The question is why the need to place them at several strategic places around Bukit Jenalik. The accused persons should have detected by then that this cannot be the "kursus kerohanian" programs they are supposed to attend.

(9) They witnessed the taking of police and military personnel as hostages on 3 July 2000 and they even admitted that two of them were killed while under their custody. The accused persons also stated that they knew four of their group members had left Bukit Jenalik on 2 July 2000 after the group came back from the two camps with weapons, ammunition and other military equipment.

It is my finding that from the above evidence adduced by the accused persons and in the circumstances of the case it is more than sufficient to warrant a reasonable inference that all the accused had the knowledge when they first assembled at Bukit Jenalik or at least at some point of time they would have reasons to believe that OKT1 had the intention to

fight against the government authority. When they continued to be associated with the group and refused to surrender after knowing the object and the intention, the court can draw an inference that they have the *mens rea* to commit the act of waging war against the government. As stated earlier, the principle of law is very clear in that *mens rea* can be formed at any stage.

It is very obvious that in the effort to convince the court that they did not have the intention to wage war against the government, all the accused had put the blame on OKT1. Apart from the evidence that had been highlighted earlier that entitles the court to draw an inference as to the existence of element of knowledge, there are other pertinent questions that the court need to consider in relation to the evidence of the accused blaming OKT1 as follows:

(1) Can one person be responsible in the act of waging war against the government?

(2) Can OKT1 alone make it possible for the seizure of weapons and other equipment from Post 2 and Camp 304? If it is only OKT1 who was responsible why did the police and armed forces took more than three days to disarm the group and arrested them?

(3) How could it be possible that several people were killed and few other military personnel and the Al-Ma'unah members were injured and shot at if it was the act of one person? OKT1 alone cannot ensure that his members did not run away from the group?

Looking at the facts of the case and evidence of all the accused as a whole, coupled with the overwhelming evidence adduced by the prosecution I find that there is no circumstances suggesting absence of knowledge and that the court may infer that all the accused had the requisite knowledge. I would like to distinguish the present case with the case of *Maganlal v. King Emperor (supra)* which has been cited by most of the learned counsels for the accused persons to support their contention that the accused should not be guilty for the offence of waging war. In *Maganlal*'s case, the court has ruled that Mallu, a member of the group was not to be held liable because Mallu and some of his co-villagers were carried away or swept along in the maelstrom of event. There were evidence that Maganlal, the group leader and his companions brought them along when they were about to enter the village. In our case all the accused were assembled at Bukit Jenalik before launching their operation. There were evidence that some of them went to obtain weapons from military camp and later there were evidence that all the accused were trained to use the weapons by OKT2 and OKT3. In the present case I

am of the view that all the accused persons would have realised when they were at Bukit Jenalik they had gathered and planned for a "mission" which is against the law.

Individual Defence

Apart from the defence of absence of knowledge and *mens rea*, each of the accused person has put up the defence of absence of evidence to show *actus reus*, no evidence of the role of each accused, mistake of fact and mistake of law and justified reason for not running away from the group on the ground of being under duress or compulsion coming from OKT1.

Evidence Of Defence Of OKT2 (Zahit bin Muslim)

I shall begin with my decision on the defence put forward by OKT2. The following are amongst the relevant facts adduced through OKT2 in his evidence during his defence case:

(a) OKT2 was Deputy President of the Al-Ma'unah group.

(b) OKT1 had told OKT2 that the group was going to get weapons from the military camp.

(c) OKT2 saw weapons, ammunition and military equipment in the group possession in the early morning of 2 July 2000 at Bukit Jenalik and was told subsequently by the group members that these weapons were taken from military camps.

(d) During examination in chief and cross examination OKT2 stated that he heard OKT1 shout that "jihad telah bermula" (English Translation: "Jihad has begun") when the group assembled at Bukit Jenalik and after the weapons were seized from the two camps. He further confirmed that OKT1 had uttered these words loudly and can be heard by all the other accused.

(e) On the morning of 2 July 2000 OKT2 stated that OKT1 had assembled the Al-Ma'unah group members and ordered them to pick up the weapons and to train using the weapons.

(f) OKT2 saw OKT1 fired few shots using M16 and M203. He also said that OKT1 fired shots at the military forces when they were surrounded.

(g) OKT2 was an ex-commando with the Police Force Unit VAT 69 and was trained to use all sorts of weapons and even to make bombs.

(h) During his examination in chief OKT2 had stated that OKT1 told him in the presence of few Al-Ma'unah group of his intention to attack Chenderoh dam and police station.

(i) OKT2 admitted during examination in chief that when OKT1 told him to take firearms from the military camps he suspected something is seriously wrong and he knew that having possession of firearms without any authorisation is an offence.

(j) OKT2 admitted that he and OKT1 had bought the green paint for the purpose of repainting the three Pajero vehicles with green colour and ordered the purchase of false vehicle registration plate numbers in Ipoh, Perak. OKT2 further stated that the false vehicle plate numbers were to be fixed to the three Pajero vehicles.

(k) OKT2 testified that on 30 June 2000 at the rented house in Kati, few of the Al-Ma'unah group were seen spraying three Pajero vehicles with green colour to resemble military vehicles. He could recall Roslan and Shahidi (OKT7) as those involved in spraying the vehicles and the rest he said he cannot remember.

(l) On 2 July 2000 at approximately 7pm, OKT2 said that he and OKT1, OKT18 and OKT9 went to Lata Kekabu and witnessed OKT1 fired shots at "pencawang elektrik" or electrical installation post using GPMG and he knew the intention of OKT1 was to cut off the electric supply to the whole of Perak state. OKT2 also said that he was carrying M16 then.

(m) OKT2 stated that OKT1 had ordered them to dig the trenches at Bukit Jenalik for the purpose of defence.

(n) OKT2 knew that four of the group Al-Ma'unah group members had left the group on the morning of 2 July 2000.

(o) OKT2 testified that he saw while he was at Bukit Jenalik exh. P166 which are books and pamphlets related to the group struggles and missions being distributed to the members.

(p) OKT2 had stated that Al-Ma'unah group was exposed with the incident in Memali and revolution in Iran. The group members were also instilled with "semangat jihad" or the spirit of jihad and were also shown videos of the jihad group's struggle in Ambon, Maluku and Bosnia.

(q) Prior to the incident in Bukit Jenalik OKT2 stated that he had heard OKT1 giving his "ceramah" or lectures condemning the government and alleging the present government as cruel.

(r) During cross examination, while they were in Bukit Jenalik OKT2 said that he saw OKT1 used radio set to communicate with the military. He confirmed that the radio set used by OKT1 to communicate was the one taken by the group together with the other weapons from the military camp. In court OKT2 was shown with exh. P19 and he confirmed that the one shown to him was the radio set similar to the one obtained by

the group from the military camp. He further confirmed that the distance between him and OKT1 while OKT1 was communicating with the military was about 15 feet and from that distance he can hear OKT1 said the code words "kosong kepada kelompok alamat". He further testified that he saw OKT1 communicating with the military twice and the first communication took about 10 to 15 minutes.

The above evidence clearly confirmed the evidence of prosecution that OKT1 had contacted and communicated twice with the military immediately after the arm heists incident and stating their demand. On this point I wish to state again of the fact that OKT1 had communicated using radio set seized from the military camp as testified by prosecution's witness was never challenged by all the other accused.

(s) OKT2 confirmed that their group had taken hostage of Sergeant Mohd. Shah (PW44), Cpl. Sagadevan, Trooper Mathews and Jaafar Putih. OKT2 further said that Cpl. Sagadevan and Trooper Mathews were killed while they were in their custody.

(t) OKT2 stated he knew that trenches were built around Bukit Jenalik.

It is my finding that based on the above relevant facts adduced through the evidence of OKT2 it has been shown that it has not only implicated OKT2 in the commission of the offence but his evidence had also implicated the other accused persons who were present at Bukit Jenalik during the said relevant period. Almost all the evidence given by OKT2 in actual fact had confirmed and strengthened the prosecution case on many aspects of the case beginning from the preparation stage done by the members of the Al-Ma'unah group until they were arrested and detained at Bukit Jenalik.

On the law when several accused are tried jointly and one of them gives evidence on his own behalf incriminating a co-accused, it has been laid down that the accused who has given the incriminating evidence is not placed in the position of an accomplice, nor does the rule of practice with regard to the corroboration of an accomplice apply to such a case, for that rule applies only to witnesses called for the prosecution. The case of *Public Prosecutor v. Yeoh Teck Chye* [1981] 2 MLJ 176 can be cited as an authority for the said proposition wherein his Lordship Wan Suleiman FJ in delivering the judgment of the Federal Court at pp. 181-182 had this to say:

> It is well settled that where the prisoners are tried jointly, and one of them gives evidence on his own behalf incriminating a co-prisoner, the prisoner who has given incriminating evidence is not placed in the position of an accomplice, nor does the rule of practise with regard to the corroboration of an accomplice apply to such a case for the rule applies only to witnesses called for the prosecution – (See *R v. Barnes & Richards* 27 Cr. Appeal R 154).

On the same point even in s. 30 of Evidence Act in substance it says the same thing, whereby the court may take into account such incriminating evidence against a co-accused. Therefore in my view it is safe for the court to put weight to the evidence of OKT2 which incriminate other co-accused persons in this case.

On the available evidence adduced it is my finding it reveals that OKT2 was in the inner circle of the Al-Ma'unah group and he was deeply involved in the preparation aspect and also made certain important decisions. From the view point of *actus reus* of OKT2 in the commission of the offence it can be seen when OKT2 in his evidence stated that he was with OKT1 and few other members of the Al-Ma'unah group who went to Lata Kekabu to shoot at the electric cable. It is my finding that OKT2 was involved in the action of the Al-Ma'unah group in waging war against the government's authority by force and violence to set up an Islamic State in the name of "jihad". I do not accept the evidence of OKT2 and other accused persons that they became confused as regard what was then happening and do not know what to do after the military weapons and ammunition were brought to Bukit Jenalik on 2 July 2000. I also reject their evidence that they could not get out of Bukit Jenalik because of their fear of OKT1. I also reject the allegation of OKT2 and other accused persons that they were under the influence or inducement of the so-called principles of "Baiyah" or "pledge of loyalty" and "Rahsia dalam Rahsia" or "Secret within a Secret" which they contended were instilled upon them by OKT1 that made them unable to question their own actions and do anything to question the actions of OKT1 and to stop him from doing any wrong doings. It is my view that OKT1 alone will not be able to successfully seized the weapons, ammunition and other military equipment from the said two army camps. It would also not be possible for a few people to be detained as hostages and some killed, together with the fact that some members of the Armed Forces and Al-Ma'unah group were shot and injured if all these were the actions carried out by one person only, that is OKT1. I am also of the view that OKT1 alone would not be in a position to control and ensure that every other members of the Al-Ma'unah group would not escape or leave the group in Bukit Jenalik.

It is my decision that OKT2 has failed to raise a reasonable doubt on the prosecution case. I am satisfied that the prosecution has proved the charge under s. 121 of the Penal Code on OKT2 beyond reasonable doubt. I therefore find OKT2 guilty and convicted him accordingly.

Evidence Of Defence Of OKT3 (Jamaludin Bin Darus)

The following are amongst the relevant facts adduced through OKT3 in his evidence during his defence case:

(a) OKT3 was the chief of Al-Ma'unah group of the northern zone or better known as Khalifah Utara.

(b) In July 2000 OKT3 was still serving in the Army with the rank of Major.

(c) OKT3 went to both camp Post 2 and Camp 304 together with other Al-Ma'unah group members and they went with three Pajero vehicles. OKT3 also agreed that all of them were wearing camouflage military uniform complete with beret and rank when they went to the two said army camps.

(d) OKT3 admitted in his testimony that he was the one who was collecting the ammunition and fire arms from the store and even admitted that he had instructed the military personnel from Camp 304 to load the three Pajero vehicles with the weapons and ammunition.

(e) During cross examination OKT3 said that he was not sure whether he was wearing his own military uniform and even was not sure of what rank he was carrying when they went to Post 2 and Camp 304. OKT3 even said that he could not agree if a member of the Armed Forces gave away his military uniform to another person.

(f) OKT3 further said that he and Al-Ma'unah group has taken possession weapons such as GPMG, M16, M203 granite launcher, radio set and ammunition from the said two army camps.

(g) OKT3 had stated that he had never before attended a military style of training with the civilian people during his twenty years of service in the Army. OKT3 further stated that what he knew was that the Army team had trained the civilian people the use of weapons and explosives together with unarmed combat. OKT3 however qualified himself by stating all this form of training were under the supervision of military personnel.

(h) OKT3 said that he knew the procedure that the taking out of weapons and ammunition can only be made by an authorised army officer and OKT3 agreed that on 2 July 2000 there was not a single army officer who had authorised and gave direction for the removal of military weapons and ammunition to be given to the members of the Al-Ma'unah group at the said camp Post 2 and Camp 304 Gerik.

(i) OKT3 admitted that he came to know that OKT1 had ordered one Al-Ma'unah member to shoot at Trooper Methews at Bukit Jenalik. OKT3 even said that he agreed if it said that he had betrayed the country and members of the rank and file in the Army for all the event that he went through at the said two army camps and at Bukit Jenalik. OKT3 said that he had knowledge that four of the Al-Ma'unah members had left Bukit Jenalik on 2 July 2000.

(j) OKT3 agreed when it was put to him that the Al-Ma'unah group members were instilled with "semangat jihad" or spirit of Jihad by OKT1 during the courses that they had attended.

(k) OKT3 had knowledge that few of the Al-Ma'unah members were stationed at the sentry points at Bukit Jenalik. OKT3 agreed that he had the ability to make a base camp.

(l) OKT3 agreed that whatever he did at camp Post 2 and Camp 304 he was acting on his own.

(m) OKT3 agreed that he did train Al-Ma'unah group members in Bukit Jenalik of how to use the weapons.

It is my finding that OKT3's evidence in his defence had confirmed the prosecution's case in many aspects of the incident in this case. I find that OKT3 was also recognised to be one of the leaders of the Al-Ma'unah group. The evidence available showed that OKT3 was involved with the preparation, planning and the making of certain decisions in the actions taken by members of the Al-Ma'unah group. As an Army Officer who at the time of the said incident was still serving in the Armed Forces, I am of the view that OKT3 certainly knew and was aware what he was doing at the said two army camps and at Bukit Jenalik was against the law. There is no evidence shown that OKT3 had made any attempt at any time to leave Bukit Jenalik while he was there. I hold the view that OKT3 had the knowledge and intention to be together with OKT1 and other members of the Al-Ma'unah group in waging war against the government's authority by force and violence to set up an Islamic State in the name of jihad.

It is my decision that OKT3 has failed to raise a reasonable doubt on the prosecution case. I am satisfied that the prosecution has proved the charge under s. 121 of the Penal Code on OKT3 beyond reasonable doubt. I therefore find OKT3 guilty and convicted him accordingly.

Evidence Of Defence Of OKT4 (Ibrahim Bin Dris)

The following are amongst the relevant facts adduced through OKT4 in his evidence during his defence case:

(a) OKT4 admitted that he went to both camp Post 2 and Camp 304 Gerik on the early morning 2 July 2000.

(b) OKT4 stated that he did not question or ask OKT1 on that morning of 2 July 2000 of their destination.

(c) OKT4 said that he saw two men wearing complete military uniforms on that early morning of 2 July 2000 but during cross examination when asked whether subsequently he knew the two men were amongst their group members, he said that they were Ruslan and Riduan (OKT13).

(d) OKT4 witnessed the taking of weapons and other military equipment from the two camps.

(e) OKT4 admitted that they were given military camouflage uniforms to wear with ranks.

(f) OKT4 admitted that he taught the Al-Ma'unah group members the safety aspects of the weapons by showing them how to do it.

(g) OKT4 stated that he and the Al-Ma'unah group members went to the two army camps using three green military Pajero vehicles.

(h) OKT4 stated that at Camp 304 OKT1 had asked one of the group members to bring a cutter to OKT1. This evidence is consistent with the evidence of prosecution witnesses that a cutter was used to take away the weapons that were chained at the weapon store at Camp 304.

(i) OKT4 had contended that if at all he knew of the intention of OKT1 to fight against the government he only came to know very much later and by that time OKT1 had threatened to kill whoever leaves the place.

(j) OKT4 said that in the morning of 2 July 2000 OKT1 had assembled all the Al-Ma'unah group members and distributed the weapons to all the members. He admitted that he was given M16 by OKT1.

(k) OKT4 contended that weapons such as M16, GPMG and M203 were used by the Al-Ma'unah group members at Bukit Jenalik.

(l) OKT4 agreed to the suggestion by the prosecution that he had to surrender because he had no choice after their group had been surrounded by the military force.

(m) OKT4 said that the Al-Ma'unah group members were stationed at several places around Bukit Jenalik. He further contended that he did see some members of the Al-Ma'unah group walking up and down when they were around at Bukit Jenalik and some of them were armed with M16 weapons.

(n) OKT4 said that when Trooper Mathews was taken hostage he witnessed the incident and said that there were few Al-Ma'unah members present together with OKT1. OKT4 further said that he heard one shot and saw Trooper Mathews was shot. He also contended that OKT5 was present and saw him carrying M16 weapon at the time Trooper Mathews was held as hostage.

It is my finding from the above evidence of OKT4 it showed that OKT4 was also one of the leaders of the Al-Ma'unah group and played a major role in the training of the group members on how to use the weapons that were seized from the said two army camps. OKT4 had a military background which is supported by the fact that he had previously served in the Armed Forces for

about 20 years. I find there is no evidence that OKT4 had taken any effort to escape from Bukit Jenalik despite putting up a defence that at some point of time he knew something seriously wrong was taking place. His reasons for not trying to escape because he feared OKT1 could not be accepted on grounds herein before given. In this case OKT4 himself had admitted that he was carrying the M16 weapon and there were opportunities that he could escape but he did not do so. In the circumstances of the case I hold the view that OKT4 had the knowledge and intention to be together with OKT1 and other members of the Al-Ma'u'ah group in waging war against the government's authority by force and violence to st up an Islamic State in the name of "jihad".

It is my decision that OKT4 has failed to raise a reasonable doubt on the prosecution case. I am satisfied that the prosecution has proved the charge under s. 121 of the Penal Code on OKT4 beyond reasonable doubt. I therefore find OKT4 guilty and convicted him accordingly.

Evidence Of Defence Of OKT9 (Kamarudin Bin Mustafar)

The following are amongst the relevant facts adduced through OKT9 in his evidence during his defence case:

(a) OKT9 went to the two army camps at Post 2 and Camp 304 Gerik together with OKT1 and other members of the Al-Ma'unah group in the early morning on 2 July 2000. OKT4 was given full set of military camouflage uniform and wore it when he went to the two camps.

(b) OKT9 went to the two camps with three Pajero vehicles and he was driving the second Pajero. OKT9 and members of the Al-Ma'unah group were told not to talk during the journey to the two camps.

(c) At Post 2 OKT9 stated that he saw OKT3 was ragging the military personnel from the camp.

(d) At Camp 304 OKT9 saw boxes were taken from the camp and were loaded into the Pajero vehicles.

(e) OKT9 said he knew that weapons and ammunition that were taken from the two camps were placed on the canvas in Bukit Jenalik.

(f) During cross examination OKT9 admitted that he had never heard the military authority gave weapons to the public and yet he said he did not suspect anything when he saw large quantity of weapons with them.

(g) OKT9 stated that on 2 July 2000 he came to know that there were three people detained by his group members at Bukit Jenalik. OKT9 also stated that he knew that an army commando was taken hostage by the group and subsequently came to know that the commando was killed by his group member.

(h) OKT9 admitted that he never tried to escape from the Al-Ma'unah group even though he said that he suspected something seriously wrong was done by OKT1. He gave reasons that he was very scared of OKT1 and also he was not familiar with the area.

(i) OKT9 saw trenches dug around the camp at Bukit Jenalik.

It is my finding that OKT9 was directly involved in the arms heists incident at the said two army camps wherein he was the driver of one of the three Pajero vehicles that were used in the commission of the offence. His evidence did not show that he had taken an effort to escape from the group. OKT9's contention that he feared OKT1 might shoot him if he tried to escape cannot be accepted as a reasonable explanation because the evidence by almost all the accused persons would suggest that there were few instances where OKT9 had the opportunity to escape from the attention of OKT1 and to flee from the group. Even if the court were to accept his contention that OKT1 will shoot him if he tried to escape, it is near impossible for OKT1 to do that and to keep an eye on each and everyone of the accused persons at all time. I also reject the contention of OKT9 that the purpose and intention of him going to Bukit Jenalik was to attend "kursus kerohanian" or a spiritual course on the ground that from the first day of his arrival at Bukit Jenalik on 30 June 2000 until 2 July 2000 there was no such course being conducted. In the circumstances of the case I hold the view that OKT9 had the knowledge and intention to be together with OKT1 and other members of the Al-Ma'unah group in waging war against the government's authority by force and violence to set up an Islamic State in the name of "jihad".

It is my decision that OKT9 has failed to raise a reasonable doubt on the prosecution case. I am satisfied that the prosecution has proved the charge under s. 121 of the Penal Code on OKT9 beyond reasonable doubt. I therefore find OKT9 guilty and convicted him accordingly.

Evidence Of Defence Of OKT5 (Jemari Bin Jusoh)

The following are amongst the relevant facts adduced through OKT5 in his evidence during his defence case:

(a) OKT5 stated that the purpose of him gong to Bukit Jenalik was to attend "kursus kerohanian" or spiritual course. OKT5 also stated that he was informed there was going to be a military training with the military authorities.

(b) OKT5 was involved in helping and preparing the three Pajero vehicles to be painted with green colour which were to be used by the Al-Ma'unah group as instructed by OKT1.

(c) OKT5 was given a set of camouflage military uniform on the evening of 1 July 2000.

(d) OKT5 said that OKT1 told him and the rest of the Al-Ma'unah group members that they were going to have a project that night but according to him no details were told and he did not ask OKT1 about it either.

(e) OKT5 admitted that in the early morning of 2 July 2000 he discovered that there were many types of military weapons placed on the canvas on the ground at Bukit Jenalik.

(f) OKT5 also admitted that at Bukit Jenalik he was given a weapon M16. During cross examination he admitted that all the other accused were also given the said firearms.

(g) While OKT5 was at Bukit Jenalik he was taught by OKT3 of how to use the weapons. During cross examination OKT5 admitted that other accused persons were also taught how to use the weapons. OKT5 did state that he even had fired few shots using the M16 weapon at Bukit Jenalik.

(h) On 3 July 2000 OKT5 witnessed two men were detained by the Al-Ma'unah group members as hostage at Bukit Jenalik and they were tied to the durian tree therein.

(i) OKT5 was responsible in detaining Trooper Mathews from the Army at Bukit Jenalik and brought him to see OKT1.

(j) OKT5 witnessed OKT1 scolded Trooper Mathews and subsequently saw OKT1 fired one shot at Trooper Mathews's leg.

(k) OKT5 did not admit of killing Trooper Mathews but said that he subsequently knew that Trooper Mathews was killed.

OKT5 had also called his wife Puan Solehah bte Safrawi (SD4(1)) to give evidence on his own behalf.

It is my finding that OKT5 was involved in the preparatory acts before the happening of the incidents at the said two army camps and at Bukit Jenalik. OKT5 was seen at the rented house in Kati, Sauk wherein he was helping members of the Al-Ma'unah group in painting the three Pajero vehicles with green colour. I find that OKT5 appeared to be one of the trusted man of OKT1 within the Al-Ma'unah group. The evidence of prosecution witness who saw OKT5 killed Trooper Mathews was further corroborated by the evidence of OKT4 who said that he saw OKT5 was with OKT1 and was carrying M16 weapon when Trooper Mathews was shot dead. Even though OKT4 did not implicate OKT5 directly (for the obvious reason to protect his friend and not to implicate him and his group indirectly) his evidence is suffice to show the

involvement of OKT5 as a person who was willing to carry out any instruction from OKT1 without any question even to an extent of killing anyone who was against their struggle.

I do not accept the explanation and the reasons given by OKT5 as regards what happened and what he had gone through while he was at Bukit Jenalik on the same grounds given in relation to other accused persons before this. I am of the view OKT5 knew and was fully aware as to what he was doing at Bukit Jenalik was against the law and he was directly involved in the offence of waging war against the Government by force and violence in the name of jihad. I also find the evidence of SD4(1) the wife of OKT5 does not at all support the defence of OKT5 that could raise a reasonable doubt on the prosecution case. The witness SD4(1) did not at all know with regard to what had happened and what OKT5 had done while he was at Bukit Jenalik.

It is my decision that OKT5 has failed to raise a reasonable doubt on the prosecution case. I am satisfied that the prosecution has proved the charge under s. 121 of the Penal Code on OKT5 beyond reasonable doubt. I therefore find OKT5 guilty and convicted him accordingly.

Evidence Of Defence Of OKT11 (Idris Bin Anas)

The following are amongst the relevant facts adduced through OKT11 in his evidence during his defence case:

(a) OKT11 went to the two army camps voluntarily after OKT1 had chosen him to be in the Al-Ma'unah group.

(b) OKT11 was given the complete set of military camouflage uniform before he and the other Al-Ma'unah members went to the two army camps.

(c) OKT11 admitted that they went to the two army camps with three Pajero vehicles.

(d) OKT11 stated that he saw members of the military personnel from the two army camps assisted by the Al-Ma'unah members in loading the Pajero vehicles with boxes. OKT11 denied having any knowledge as to the content of the boxes due to the fact that most of the time he was asleep.

(e) OKT11 said that they were supposed to attend "kursus kerohanian" or spiritual course but eventually there were no such programs taking place. OKT11 admitted that the gathering at Bukit Jenalik was different from any other course that he had attended before.

(f) OKT11 stated that at the two army camps he thought that OKT3 was having a spot check on the two camps.

(g) OKT11 saw a large quantity of weapons and other military equipment were placed in Bukit Jenalik.

(h) OKT11 did not make any attempt to escape from Bukit Jenalik.

It is my finding that OKT11 was directly involved in the arms heists incident at the said two army camps and that he knew what he and the other members of the Al-Ma'unah group were doing at the two camps was a criminal act. I do not accept the contention of OKT11 that he did not know the contents of the boxes that were loaded into the three Pajero vehicles while he was at the said two army camps due to the fact that most of the time he was asleep. To my mind this is a bare denial because earlier OKT11 had said that he was looking forward to participate in the activities organised by the Al-Ma'unah group and had contended that he was under the impression that what happened at the said two army camps was part of the training exercise with the army. OKT11's story did not reflect someone who was so excited and anxious to get involved in the training exercise with the military. I also reject the contention of OKT11 that he thought OKT3 was having a spot check on the said two army camps while he was there. I find that this is in contradiction with his earlier version that he thought there was going to be a military exercise with the military as told by OKT1. In fact under cross examination OKT11 agreed that if at all OKT3 wanted to conduct a spot check at the said two army camps there was no necessity to bring so many people along with him.

I do not accept the contention of OKT11 that he feared OKT1 would shoot him if he was to leave Bukit Jenalik at any time while he was there because this is not a reasonable explanation. My grounds for rejecting such a contention are the same as herein before given with regard to the other accused persons who put forward the same explanation for fearing OKT1 while they were at Bukit Jenalik. I also reject the contention of OKT11 that the purpose of him going to Bukit Jenalik was to attend a spiritual course taking into consideration of the fact from the time of his arrival at Bukit Jenalik on 30 June 2000 until 2 July 2000 there was no such course being conducted. I hold the view that in the circumstances of this case OKT11 had the knowledge and intention to be together with OKT1 and other members of the Al-Ma'unah group in waging war against the government's authority by force and violence to set up an Islamic State in the name of "jihad".

It is my decision that OKT11 has failed to raise a reasonable doubt on the prosecution case. I am satisfied that the prosecution has proved the charge under s. 121 of the Penal Code on OKT11 beyond reasonable doubt. I therefore find OKT11 guilty and convicted him accordingly.

Evidence Of Defence Of OKT23 (Mohd. Bukhari Bin Ismail)

The following are amongst the relevant facts adduced through OKT23 in his evidence during his defence case:

(a) OKT23 had previously attended courses conducted by the Al-Ma'unah group in Cherating, Gubir and Penur before this incident at Bukit Jenalik.

(b) OKT23 was responsible in teaching the Al-Ma'unah group members with the spiritual aspects of Islam or the so-called "Ilmu Kerohanian Islam".

(c) OKT23 worked as a clerk at the Al-Ma'unah group's office in Kelang. He is a graduate and had obtained a degree in Islamic Studies from Al-Azhar University in Egypt.

(d) OKT23 was responsible for keeping all the fees collected from the Al-Ma'unah group members and the financial accounts.

(e) On the morning of 2 July 2000 OKT23 witnessed OKT1 fired some shots using the M16 weapon and he also could see large quantity of weapons placed in one of the Pajaro vehicle at Bukit Jenalik.

(f) On the afternoon of 3 July 2000 he saw two men who were detained by the Al-Ma'unah group members digging trenches in Bukit Jenalik.

(g) OKT23 said he began to realise on the night of 4 July 2000 that there was no such spiritual course to be conducted at Bukit Jenalik.

(h) OKT23 stated that on 5 July 2000 he found out that Bakar a member of the Al-Ma'unah group was shot but he did not take any steps to know who shoot him and why.

(i) OKT23 said he tried to escape with OKT5 on the morning of 6 July 2000 from Bukit Jenalik but he said OKT1 had found out and shouted at them.

(j) OKT23 stated that he was familiar with the area in Bukit Jenalik as he frequently went to the area around the cook house and the area around the stream therein. OKT23 further stated that he came into Bukit Jenalik on 30 June 2000 from the back portion of the school near Bukit Jenalik.

(k) OKT23 stated that he came to know four of Al-Ma'unah group members had escaped from Bukit Jenalik on 2 July 2000.

It is my finding that from the evidence adduced it reveals that OKT23 was also one of the important members of the Al-Ma'unah group to OKT1. He was the one responsible in maintaining the financial accounts of the Al-Ma'unah group. His evidence would indicate that even though he was supposed to teach the group members with matters pertaining to "Ilmu kerohanian" during their stay in Bukit Jenalik, he did not feel anything unsual when there were no such classes conducted. It is my view that OKT23 was merely making

up stories about the said spiritual course to be conducted and in actual fact OKT23 and all the other accused persons were all prepared to carry out their planned mission. I do not accept the explanation and the reasons given by OKT23 as regards what happened and what he had gone through while he was at Bukit Jenalik on the same grounds given in relation to other accused persons before this. I am of the view that OKT23 knew and was fully aware as to what he was doing was against the law and he was involved in the offence of waging war against the Government by force and violence in the name of "jihad".

It is my decision that OKT23 has failed to raise a reasonable doubt on the prosecution case. I am satisfied that the prosecution has proved the charge under s. 121 of the Penal Code on OKT23 beyond reasonable doubt. **I therefore find OKT23 guilty and convicted him accordingly.**

Evidence Of Defence Of OKT20 (Mohd. Ramly Bin Mohamood), OKT22 (Che Sabri Bin Che Jaafar) And OKT29 (Yunus Bin Hussin)

OKT20, OKT22 and OKT23 were the Al-Ma'unah group members who came together to Bukit Jenalik from Kelantan. OKT20, OKT22 and OKT29 while they were at Bukit Jenalik they were found to be close together in their movement therein. For this reason I shall evaluate their evidence and their defence as far as possible together and on the same approach.

The following are amongst the relevant facts adduced through their evidence during their defence case:

(a) OKT20, OKT22 and OKT29 had all stated that the purpose of them going to Bukit Jenalik was to attend "kursus kerohanian" or spiritual course after they had been requested by a person named Khalifah Manaf to replace the Al-Ma'unah group members from Kelantan who could not make the trip to Bukit Jenalik to attend the said course.

(b) OKT20, OKT22 and OKT29 stated that they had first met OKT1 at Grik and were later taken by OKT1 to a house at Kati, Sauk before they were brought by OKT1 to Bukit Jenalik.

(c) OKT20 and OKT29 both said that they were asked by OKT1 to become cooks while they were at Bukit Jenalik.

(d) OKT20, OKT22 and OKT29 all said that they saw members of the Al-Ma'unah group wearing military uniforms and holding firearms at Bukit Jenalik. They also said they could see large quantity of weapons in Bukit Jenalik.

(e) On the morning of 3 July 2000 OKT20, OKT22 and OKT29 saw two strangers digging trenches at Bukit Jenalik and they later came to know these two people were police personnel that had been detained by members of the Al-Ma'unah group.

(f) OKT20 saw a stranger held captive by the Al-Ma'unah members at Bukit Jenalik and later found out that the person was Jaafar bin Putih.

(g) OKT20, OKT22 and OKT29 had contended that they made an attempt to escape and leave Bukit Jenalik by walking through a stream that run through Bukit Jenalik but failed after they heard some voices in their vicinity at that point of time.

I do not accept the contention of OKT20, OKT22 and OKT29 that they had made an attempt to escape and leave Bukit Jenalik after they found out that firearms were brought to Bukit Jenalik on 2 July 2000. Their explanation of how they tried to escape was unconvincing and unreasonable. It can be safely concluded that there was never any attempt made by them to escape. I reject their explanation and the reasons given as regards what happened and what they had gone through while they were at Bukit Jenalik on the same grounds given in relation to other accused persons before this. I hold the view that OKT20, OKT22 and OKT29 in the circumstances of the case had the knowledge and intention to be together with OKT1 and other members of the Al-Ma'unah group in waging war against the government's authority by force and violence to set up an Islamic State in the name of "jihad".

I take the view that even though OKT20 and OKT29 had contended that they were directed by OKT1 to be cooks while they were at Bukit Jenalik, it does not matter how minor the role of an accused person is for an offence under s. 121 of the Penal Code. The law makes no distinction between the person who was the master-mind or a cook. All are responsible of the treasonable act as long as they formed part of the group and know the object of the general nature that is to wage war against the government in the name of "jihad".

It is my decision that OKT20, OKT22 and OKT29 have failed to raise a reasonable doubt on the prosecution case. I am satisfied that the prosecution has proved the charge under s. 121 of the Penal Code on OKT20, OKT22 and OKT29 beyond reasonable doubt. I therefore find OKT20, OKT22 and OKT29 guilty and convicted them accordingly.

Evidence Of Defence Of OKT25 (Md. Amin Bin Othman)

The following are amongst the relevant facts adduced through OKT25 in his evidence during his defence case:

(a) OKT25 was a Science graduate from the National University of Malaysia (UKM).

(b) OKT25 stated that he went to Bukit Jenalik for the purpose of attending 'kursus kerohanian" or spiritual course.

(c) OKT25 said that while he was at Bukit Jenalik he saw 10-12 of the Al-Ma'unah group members were wearing military uniforms.

(d) OKT25 stated that on the morning of 2 July 2000 he saw the presence of three Pajero vehicles and large number of firearms at Bukit Jenalik.

(e) OKT25 admitted that at Bukit Jenalik he was placed near a durian hut together with two other members of the Al-Ma'unah group.

(f) OKT25 knew that two police personnel were taken hostage by the Al-Ma'unah group members at Bukit Jenalik.

(g) OKT25 knew that Trooper Mathews was shot dead at Bukit Jenalik but never questioned who shot him.

(h) OKT25 stated that he was aware that OKT1 had committed an offence in detaining two police personnel.

(i) OKT25 never made any attempt to escape from Bukit Jenalik upon knowing OKT1 had done an illegal act.

I find that OKT25 had pretended not to know what had happened around him. He chose either to evade answering questions which were detrimental to him or to find an easy way out by giving the answer "tak nampak" or did not see.

It is my finding that OKT25 in the circumstances of this case had the knowledge and intention to be together with OKT1 and other members of the Al-Ma'unah group in waging war against the government's authority by force and violence to set up an Islamic State in the name of "jihad".

It is my decision that OKT25 has failed to raise a reasonable doubt on the prosecution case. I am satisfied that the prosecution has proved the charge under s. 121 of the Penal Code on OKT25 beyond reasonable doubt. I therefore find OKT25 guilty and convicted him accordingly.

Common Defence

I would like to deal also with some of the common defence put forward by the accused persons in this case.

As regards the defence on the ground that the accused persons as members of the Al-Ma'unah group were forced to commit the act in this case or merely to follow the direction of OKT1 without questions on the ground of being under duress or compulsion operating in their mind as a result of OKT1's action while they were at Bukit Jenalik, I could not accept such a defence. s. 94 of the Penal Code clearly stipulate that threat or duress is not a defence for offences against the State such as the offence under this s. 121 of the Penal Code. Even in other cases, if an accused is to succeed in putting up

this defence evidence must be produced that there is a reasonable fear at that very time of instant death. Mere menace of future death is not sufficient in a situation by which any accused person became subject to threat of another person whatever threats that may have been used towards him. The provision of this s. 94 of the Penal Code avail him nothing. On this point I would like to cite the case of *Alexander Mac Growther* cited in *Ratanlal Law of Crimes* at p. 323 wherein it had this to say:

> Where some prisoners pleaded that in 1746 they joined the Duke of Perth in arms against the King, because they feared that their houses would be burned and their goods spoiled, all the Judges concurred that the prisoners were rightly convicted, and Sir M. Foster points out **that if threats of this kind were an excuse, it would be in the power of any leader of a rebellion to indemnify all his followers.** (emphasis added).

On the same point in the case of *Aung Hla v Emperor (Supra)* at p. 241 the learned judge Page CJ had stated as follows:

> It is, of course a misfortune for a man that he should be placed between two fires, but it would be a much greater misfortune for society at large if criminals could confer impunity upon their agents by threatening them with death or violence if they refused to execute their commands. If impunity could be so secured a wide door would be opened to collusion and, encouragement would be given to associations of malefactors, secret or otherwise.

I am of the view that not only is the law against the accused persons in this case in raising this defence of duress or compulsion, but the facts and circumstances of the case also did not suggest that the accused were placed in a situation where they could not escape from OKT1. Evidence as clearly shown during cross examination of all the accused would suggest that all the accused have had the opportunity to leave the group since OKT1 (the person they feared most) could not keep an eye on each and everyone of the accused at all time. The contention of most of the accused that only OKT1 was carrying the weapon proved to work against them because if the court were to accept this piece of evidence it would make their contention of fearing OKT1 unreasonable. How could OKT1 alone in a position to ensure and to monitor other members of Al-Ma'unah do not leave the group. Could it not be more sensible and reasonable for OKT1 to tie up all the group members especially at night (as what they did to the hostages) to ensure they did not try to escape. Further it is an undisputed fact that four of the Al-Ma'unah group members had left the group without any harm. They could also follow these four persons but they did not. In the circumstances of this case it is my finding that there was no such element of threat or duress made by OKT1 on the accused persons that could affect them in making their own decisions and actions.

The learned counsels for the defence also contended that some of the accused persons were labouring under a mistake of fact which consequently negatived *mens rea* and this would tantamount to a complete defence under s. 79 of the Penal Code. Alternatively it was submitted that if a mistake of fact does not fall under s. 79 of the Penal Code it would still be a mistake of fact under the Common Law. It is the law under s. 79 of the Penal Code that before a mistake of fact can be accepted as a defence, the following conditions must be satisfied:

(a) the state of things believed to exist would, if true, have justified the act done;

(b) the mistake must be reasonable or in good faith;

(c) the mistake must relate to fact and not to law.

To get the protection under this section, the accused must prove to the satisfaction of the court that there must be a reasonable ground that the accused in good faith believed whatever events that had taken place at the two army camps had obtained the approval from the higher authority of the military. The accused persons must also give a reasonable explanation that they were under the mistaken believe of fact that they were going to have an exercise with the military as told by OKT1. They had contended that they were further convinced that they were going to have the training with the military because OKT3 himself was a military officer. I am of the view that the reasonableness of certain fact depends on the circumstances of the case. The test is whether the court believe the accused explanation might reasonably be true. In determining whether accused had a genuine belief the court will have to direct to the evidence as a whole that make such a belief more or less probable. I hold the view that the contention of mistake of fact due to the fact that OKT1 was a very influential leader of the Al-Ma'unah group and that as Al-Ma'unah members they had taken the pledge of loyalty or "baiyah" before OKT1 was not reasonable because the surrounding circumstances of the case as contended earlier would have made their belief unjustified and unreasonable. I find as a fact that the level of intelligence of all the accused were quite high considering most of the accused were well educated and to those who were not highly educated they were old and matured enough to think wisely and to know what is right or otherwise.

It is to be noted that in common law even though the objective test of the reasonable man in determining whether there is a mistake of fact or otherwise was rejected, nevertheless the cases seem to suggest that the court still has an obligation to direct their attention to the surrounding circumstances of the case and evaluating features of the evidence that make such a belief more or less probable. This can be seen in the case of *Beckford v. The Queen* [1988] AC 130 wherein Lord Griffiths in delivering the judgment of the Privy Council at p. 145 had this to say:

> … This is hardly surprising for no jury is going to accept a man's assertion that he believed that he was about to be attacked without testing it against all the surrounding circumstances … where there are no reasonable grounds to hold a belief it will surely only be in exceptional circumstances that a jury will conclude that such a belief was or might have been held.

Section 52 of the Penal Code defines good faith as "nothing is said to be done or believed in good faith which is done or believed without due care and attention." I am of the view that mere good faith in the sense of simple belief is not sufficient. The belief must be reasonable and not an absurd belief. There must be some reasonable ground for it. Good faith requires not logical infallibility but due care and attention. However there can be no general standard of care and attention applicable to all persons and under all circumstances. The standard of care and caution must be judged according to the capacity and intelligence of the person whose conduct is in question. It must be considered with reference to the position of the accused and circumstances under which he acts. The law does not accept the same standard of care and attention from all persons. It varies in different cases. For all the accused persons in the present case it is my finding that evaluating the evidence as a whole and taking into consideration their respective background there is no basis for the accused persons to have any reasonable belief that what they did was believed to be true. It is really difficult to believe that the accused persons were labouring under a mistake of fact when committing the said offence. For this reason I hereby rejected the defence on the ground of labouring under a mistake of fact under s. 79 of the Penal Code or mistake of fact under the Common Law relied on by any of the accused persons in this case.

Sentence

All the nineteen accused person have been found guilty and convicted for an offence under s. 121 of the Penal Code which provides as follows:

> Whoever wages war against the Yang di-Pertuan Agong or against any of the Rulers or the Yang di-Pertuan Negeri, or attempts to wage such war, or abets the waging of such war, shall be punished with death or imprisonment for life, and if not sentenced to death shall also be liable to fine.

Section 121 falls under Chapter VI of the Penal Code and s. 130A(b) in the same Chapter VI of the said Code defines the term "imprisonment for life" means (subject to the provisions of any written law conferring power to grant pardons, reprieves or respites or suspension or remission of punishments) imprisonment until the death of the person on whom the sentence is imposed. Therefore the sentence of imprisonment for life under s. 121 of the Penal Code would mean that an accused person convicted and sentenced under this section would serve his sentence for the duration of his natural life.

It would be noticed that this s. 121 of the Penal Code gives the court the discretion to pass only a sentence of death or life imprisonment on an accused person convicted for such an offence. However limited as this discretion may appear to be the court must act judiciously in determining the sentence to be imposed. The court must act in accordance with the relevant sentencing principles and guidelines. In this regard I am mindful of the foremost principle to be considered is in relation to the question of public interest. His Lordship Hashim Yeop Sani J (as he then was) said in *PP v. Loo Choon Fatt* [1976] 2 MLJ 256 at p. 257: "One of the main consideration in the assessment of sentence is of course the question of public interest." His Lordship quoted with approval the dictum of Hilbery J in the case of *R v. Kenneth John Ball* [1951] 35 Cr. App. R.164. His Lordship Abdoolcader J (as he then was) in the case of *PP v. Teh Ah Cheng* [1976] 2 MLJ 186 at p. 187 observed:

> In sentencing generally the public interest must necessarily be one of the prime consideration … Public interest should never be relegated to the background and must of necessity assume the foremost importance.

His Lordship Raja Azlan Shah Ag. LP (as His Royal Highness then was) in the Federal Court decision of *Bhandulananda v. PP* [1982] 1 MLJ 83 on an appeal against sentence for the offence of giving false testimony in court *inter alia* had this to say:

> He (the trial judge) took the course he did in outweighing the plea of mitigation in favour of the public interest with a desire to uphold the dignity and authority of the law as administered in this country. We agree. That must receive the greatest weight. It is a serious offence to give false testimony, for it is in the public interest that the search for truth should, in general and always, be unfettered. The courts are the guardian of public interest.

Whilst public interest plays an important role in sentencing practise, it is accepted that there are other important factors or principles which a court needs to consider in imposing a particular sentence. Amongst these factors or principles to be considered are the interests of the accused persons, their plea of guilty and discount or credit for the plea of guilty, the circumstances under which the offence was committed, the comparison of sentences in other cases for a similar offence, the justification for a disparity of sentence amongst the accused persons and other mitigating factors relevant to the case. As regards the disparity of sentences amongst accused persons if two or more persons had either pleaded guilty or had been found guilty for the same offence committed jointly, the general rule is that any unjust disparity should be avoided. However there is nothing to prevent the court from imposing a range of sentences on the accused persons if there are important considerations for so doing. The ages of the accused, the degrees of culpability and the

differences in mitigation are amongst some of the important factors which warrant a disparity in sentences. (See the case of *PP v. Ravindran* [1993] 1 MLJ 45).

Before me now, all the learned counsels for the nineteen convicted accused persons in the plea of mitigation submitted that the court should exercise its discretion not to impose the maximum punishment of death sentence. Mr. Karpal Singh the learned counsel for OKT1 contended that this is the first case of its kind where the accused persons have been found guilty for an offence of waging war under s. 121 of the Penal Code in this country. Having regard to the fact that the death penalty is provided for the offence, it was impressed upon me that the court has to show concern, anxiety and deliberation before passing sentence. Learned counsels for the accused persons also reminded me that there is no precedent or case authorities in this country for me to look into for the sentence passed on this offence and the only case authorities for me to seek guidance are from the Indian case laws. The court was further enlightened that even in India where there is a choice in the sentence between the death penalty or life imprisonment to be passed for this type of offence it is the norm that only life imprisonment was passed. It was also submitted by Mr. Karpal Singh in order that the sentences may be properly graded to fit the degree of gravity of each case, it is necessary that the maximum sentence prescribed by the law should as observed in the Indian case of *Bachan Singh v. State of Punjab* AIR [1980] SC 898 be reserved for the rarest of the rare cases which are of an exceptional nature.

The learned senior deputy Public Prosecutor, Dato' Gani Patail for the prosecution in his reply submitted *inter alia* that the accused persons convicted have gone to the extreme in the act of waging war and the fact that this is the first case of its kind that has ever happened in Malaysia showed that it is not a culture in our country for people to commit such an offence. The convicted accused persons had a general purpose which is not to change a certain policy of the government but to overthrow the government of the day by force and violence. Their purpose was to introduce a new system entirely and purely by undemocratic way against the wishes of the majority of the people. It was submitted that the court would notice that from the facts of the case the action of the accused persons as members of the Al-Ma'unah group were carried out in a premeditated and calculative manner. It was not part of a sudden uprising or riot. For the prosecution it was further submitted that as regards some of the convicted accused persons having pleaded before the court of their minimal involvement, the law does not recognise any minimal involvement or a participation to reveal whether the crime is of a serious nature or not. The culpability and the liability of each and every single one of them is the same and that whatever punishment provided must be the

same for all of them. The prosecution therefore urged the court to seriously consider the death penalty as the first option to look at as the sentence to be passed in the interest of the public and in order that a strong and deterrent message is send out to would be offenders of similar crime.

Having heard the submissions on the plea of mitigation made on behalf of all the nineteen convicted accused persons and the reply by the prosecution and applying the principles and guidelines as to sentencing hereinbefore mentioned the sentence of this court is as follows:

I hereby sentenced to death as provided under s. 121 of the Penal Code on OKT1 (Mohd. Amin Bin Mohd. Razali), OKT2 (Zahit bin Muslim) and OKT3 (Jamaluddin bin Darus).

As regards the rest of the accused persons who are OKT4 (Ibrahim bin Dris), OKT5 (Jemari bin Jusoh), OKT9 (Kamarudin bin Mustafar), OKT10 (Abdul Ghani bin Ali), OKT11 (Idris bin Anas), OKT12 (Mohamad Faudzi bin Hamdan), OKT15 (Nasruddin bin Mohd Jailani), OKT16 (Ahmad Sarkawi bin Sulong), OKT17 (Zainal bin Mohd Jailani, OKT19 (Mohd Zaini bin Mohd Zainal), OKT20 (Mohd Ramly bin Mohamood), OKT22 (Che Sabri bin Che Jaafar), OKT 23 (Mohd Bukhari bin Ismail), OKT24 (Suhaimi bin Hasbullah), OKT25 (Md Amin bin Othman), and OKT29 (Yunus bin Hussin) I hereby sentenced them to life imprisonment respectively as provided under s. 121 of the Penal Code.

In arriving at the decision to sentence the accused persons accordingly under s. 121 of the Penal Code I have considered and balanced the public interest with that of the interest of each of the accused persons. I am of the view that the public interest should outweigh the interest of the accused persons. The offence committed by all the accused persons appears to be amongst the most serious offences as provided under the Penal Code and in the history of the administration of criminal justice in this country this is the first time such accused persons had been charged for an offence of waging war against the Yang di-Pertuan Agong under s. 121 of the Penal Code. It is my finding that all the accused persons had been involved either directly or indirectly in realising the objectives and the mission of the Al-Ma'unah group in overthrowing the government of the day by force or violence in the name of "jihad". To recapitulate the incidents in this case we have seen large number of members of the Al-Ma'unah group amongst the accused persons were involved in the act of illegal entry into the two army camps at Post 2, Kuala Rhui and Camp 304 Gerik using three Pajero vehicles which had been painted with the green colour and fixed with a false military registration plate numbers to resemble as military vehicles. At the said two army camps they were involved in seizing large quantity of military weapons of various type such

as M16, M203, GPMG, LMG, ammunitions and other military equipment. They had acted by way disguising themselves as military personnel whereby they were fully dressed in army uniforms and had tricked and forced the serving army personnel at the said two army camps to surrender the weapons to them. After the arms heist incident the accused persons were each given a M16 weepon to be used for the purpose of their mission.

At Bukit Jenalik the accused persons were taught and trained how to shoot by using the seized weapons. While they were at Bukit Jenalik they were involved and had witnessed the detention and the torturing of four people comprising two police personnel, an army personnel and a civilian. Two of them being a police personel and military personnel were later brutally killed at Bukit Jenalik. The accused persons led by OKT1 were also involved in the attack and exchange of fire with members of the security forces at Bukit Jenalik. Soon after the seized weapons were brought to Bukit Jenalik on the direction of OKT1 some members of the Al-Ma'unah group went to the Carlsberg Brewery Factory at Shah Alam, the Guiness Anchor Brewery Factory at Petaling Jaya and the Batu Caves temple in Selangor to commit the act of bombing these three places by using the M16 and M203 weapons. OKT1, OKT2 and some other members of the Al-Ma'unah group also went to Lata Kekabu, Lenggong, Perak to commit the act of shooting the electric cables of the TNB power station there with a view to causing darkness in the area. In the circumstances of this case it cannot be portrayed how serious they had carried out their activities. The activities of the accused as members of the Al-Ma'unah group had shocked all citizens of the country. I cannot imagine how the situation in this country with its multi-racial and multi-religious composition would have been if their activities were not swiftly foiled by members of the police force and the armed forces. It must be emphasised here that extremism and terrorism of any form cannot be tolerated and never will be part of any civilized community. Definitely it cannot be part of the system of our country. I would be failing in my duty if I do not send out a clear and strong message to would be offenders of similar crime of the seriousness of this offence. Hence it is my fervent hope that the sentence passed on each of the accused persons would have well served the public interest and reflect the public abhorrence of the crime committed by them.

In the line with the principles of sentencing and the requirement to give reasons when the court awards the maximum sentence provided by the law I shall herein record my reasons for doing so. In sentencing OKT1 to death as the penalty I find that OKT1 is the undisputed leader of the Al-Ma'unah group and the master mind in the mission of the group to topple the government of the day by force or violence in the name of "jihad" to set up an Islamic State. The active involvement of OKT1 in the commission of the offence can be

clearly seen through the various findings of facts which I had earlier made as hereinbefore listed out against him. OKT1 had carried out his actions in a pre-meditated and calculative manner. This is not the simplest of the type of waging war case when compared with the case authorities in India cited by learned counsels for the accused persons. Most of the cases cited by learned counsels for the accused persons appeared to be committed only in the mob like fashion as a result of a riot or a sudden uprising to protest against certain policy of the government. It is not the same as in the present case on all account.

In sentencing OKT2 to death I find that OKT2 was the right-hand man of OKT1 in the Al-Ma'unah group wherein OKT2 was deeply involved in the preparation stage as well as having made important decision for the group. It is my finding that OKT2 at all times knew and was aware of all the plannings made by OKT1 to fulfill their mission. From the aspect of *actus reus* of OKT2 in committing the offence it should be noted that OKT2 admitted that he was together with OKT1 and a few other members of the Al-Ma'unah group that went to Lata Kekabu, Lenggong to shoot at the electric cable of the TNB power station there and he himself was armed with a M16 weapon. OKT2 was seen together with OKT1 when they bought the twin blade swords or "parang kembar" at the Central Market, Kuala Lumpur. Both of them were also seen together at a shop in Ipoh when they placed an order for the purchase of false army vehicles registration plate numbers for the three Pajero vehicles that were used in the arms heist incident at the said two army camps.

In sentencing OKT3 to death I also find that OKT3 was the right-hand man of OKT1 and considered him to be one of the leaders of the Al-Ma'unah group. In fact OKT3 was acclaimed to be the Al-Ma'unah group leader for the Northern Region or better known as "Khalifah Utara". As a still serving military officer in the Malaysian Armed Forces at the time of the commission of the offence, it is my view that OKT3 had disregarded his duties as a military officer and betrayed his loyalty to the Army, the King and the country. OKT3 had played a very prominent role in the arms heist incidents at the said two army camps. OKT3 himself in his evidence under cross-examination admitted in the circumstances of the case he was a traitor to the country and to his lower rank army personnel for what he did at the said two army camps.

In execising my discretionary powers to impose the sentence of life imprisonment on the remaining accused persons OKT4, OKT5, OKT9, OKT10, OKT11, OKT12, OKT15, OKT16, OKT17, OKT19, OKT20, OKT22, OKT23, OKT24, OKT25 and OKT29 this is the only choice of sentence that I could pass on them. It is my finding that these accused persons do not appear to be the masterminds or who could be considered as leaders amongst the Al-Ma'unah group. In committing the offence in this case I could not clearly see

and evaluate their role that could be considered big or small. However I find that all of them had collectively and together played their respective roles in fulfulling the objectives and the mission of the Al-Ma'unah group. For this reason I am constrained to pass the same sentence on each of them. For OKT5 (Jemari bin Jusoh) whom I have graded into this remaining group of accused persons I take the view that although the evidence in this case revealed that he was the person who fired a shot at Trooper Mathews, the army personnel who was detained and killed at Bukit Jenalik, I would still consider that his role could not be equated with the dominant roles played by OKT1, OKT2 and OKT3. It is my finding that the action taken by OKT5 in shooting Trooper Mathews was merely under the direction of OKT1 whom he loyally obeyed in the circumstances of the case.

Finally, I hereby make an order that all exhibits of the case are to be kept in this court until the completion of the process of appeal.

After the completion of the process of appeal all exhibits of the case are to be disposed under the direction of the Public Prosecutor.